17653

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

114959

B-200170

APR 1 1981

Do not make available to public inspection

The Honorable John D. Dingell, Chairman
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

You have requested that we supplement our October 10, 1980, opinion (B-200170) concerning a proposed plan of ~~the Department of Energy (Energy)~~ DOE for the distribution of ~~$25 million in~~ overcharge refunds obtained as a result of a settlement reached between the Getty Oil Company (Getty) and the Secretary of Energy and Energy's Special Counsel for Compliance (Special Counsel). You have asked us to review in our supplemental opinion the legality of a variety of actions or positions taken by Energy concerning the distribution of overcharge refunds obtained through consent orders between Energy and several other producers of petroleum products.

In brief, our review is to consider the legality of (1) the denial by Energy's Office of Hearings and Appeals (OHA) of several petitions by enforcement officials to utilize the procedures of Energy's Subpart V regulations (10 C.F.R. §§ 205.280-205.288); (2) the solicitation of public comments on the manner in which consent order funds should be distributed by Energy, published at 45 F.R. 59627, September 10, 1980, in light of the Subpart V requirements; (3) the proposed use by OHA of overcharge funds, including interest, to cover its administrative costs in considering, and carrying out, Subpart V petitions; (4) the discretionary authority granted to OHA in the Subpart V regulations to distribute consent order funds either to the Treasury, or "in any other manner specified" in OHA's Decision and Order (10 C.F.R. § 205.287(c)); and (5) the distribution by the former Special Counsel of $1 million to each of four charitable institutions from an escrow account established pursuant to a settlement between the Standard Oil Company of Indiana and Energy. You also asked that we provide an indication of the actions that should be taken to correct this situation, as well as an analysis of the obligations of the Special Counsel.

Our conclusions, are that (1) OHA may not lawfully deny petitions under Subpart V; (2) OHA may solicit public comments under Subpart V, but only as to means of identifying and and locating those who are en-

516387

titled to refunds; (3) OHA may not use any portion of the funds to pay its own administrative expenses; (4) OHA may not distribute surplus Subpart V refunds except to effect restitution to those hurt by the overcharges in question, or for deposit in the Treasury; and (5) The Special Counsel had no authority, and therefore acted unlawfully, in distributing overcharge refunds to charitable institutions.

The October Opinion

Previously, you requested that we examine a proposed distribution by Energy of consent order funds paid into an escrow account by Getty Oil Company. We examined the distribution plan in light of the terms of the Order, the pertinent legislation and regulations under which Energy carried out the enforcement of price and allocation controls on petroleum products, and the nature and scope of restitutionary authority available to Energy. On the basis of this analysis, we concluded that Energy could not lawfully implement its proposed distribution of $25 million to defray the heating oil costs of low-income persons without regard to their status as former heating oil customers of Getty, both because the plan did not effect restitution and because Energy failed to follow its own mandatory regulations. We reaffirm these conclusions, which are specifically applicable to the present request. It may be helpful to summarize the opinion at this point.

The Getty Consent Order contained no provision controlling the distribution of the $25 million refund. Energy proposed to make "restitution" by distributing the bulk of the funds to states where Getty presently has heating oil customers, to be used to assist low-income users of heating oil, with the balance of the funds to be distributed to lower grade members of the Armed Services currently residing in those states.

Energy asserted that its restitutionary authority included the power to take any action necessary to eliminate or compensate for the effects of a violation of its petroleum price and allocation regulations. However, in analyzing Energy's implied power to order restitution as a remedy for violation of the regulations, we determined that "energy's remedial authority is limited to ordering a violator to make refunds to overcharged customers." (October opinion, p. 5).

We examined the distribution plan for the Getty funds in light of our view of Energy's restitutionary authority. We concluded:

> "In order for any distribution of the Getty funds to satisfy the statutory and regulatory requirements for restitution, it must be made in approximate proportion to the injury actually sustained to Getty customers and to ultimate consumers of Getty products who were the victims of the overcharges." (October opinion, p. 7)

We recognized

> "* * * that it is frequently not possible to identify each individual customer or consumer who has been overcharged nor is it always possible to make a precise determination of the amounts each individual has been overcharged. So long as a good faith effort was made to identify overcharged individuals, we would not view a distribution scheme which lacked dollar for dollar precision as unauthorized. However, the Energy distribution scheme in the Getty case does not sufficiently relate distributees to those injured to support a finding of restitution." (October opinion, p. 10)

Finally, we concluded that to the extent Energy receives consent order funds that it will return to overcharged purchasers, either directly or through the Subpart V procedure, Energy acts as a trustee of the funds, which need not be deposited in the general fund of the Treasury. However, where--as in the Getty distribution plan--Energy claims the right to distribute overcharge funds to recipients of its own choosing, rather than to actual overcharged customers, Energy is no longer acting as a trustee for the consumers, and the funds must be deposited in the Treasury as miscellaneous receipts under 31 U.S.C. § 484. (October opinion, p. 12)

Denial of Petitions for Subpart V Special Procedures

In our October opinion, we determined that Energy's Subpart V regulations were statutory regulations, binding upon Energy, and that as a result, the procedures established in the regulations to distribute overcharge refunds were mandatory. We held that Energy had to follow these procedures in distributing refunds under the Getty Consent Order, even though Energy claimed it had an agreement with Getty to the contrary.

In your present request you set forth a list of petitions for Subpart V procedures that OHA denied on the ground that the refund amounts involved were too small. OHA's position is that

> "Although Subpart V is not expressly limited in its application to major cases such as the Gulf proceeding, it will not be applied by this Office to cases involving small refund amounts absent a showing of special need for implementing the subpart." (James M. Forgotson, 4 DOE ¶ 82, 567, ~~DFF-0005~~ (~~November~~ 28, 1979)).

In our opinion, under Subpart V, OHA has no discretion to reject petitions in "minor" cases. As we noted in the October opinion the scope of Subpart V is set forth in the regulations:

> " * * * This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in * * * a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive." (10 C.F.R § 205.280. Emphasis added.)

Under the regulations, OHA has some discretion to decline to consider individual applications for refunds that involve amounts too small to process in view of the administrative costs involved (10 C.F.R. § 205.286(b)). However, OHA does not have similar discretion in considering petitions to implement the special procedures. As initially proposed by OHA, the purpose and scope provision of the regulations had not been couched in the mandatory terms finally adopted. Rather, the proposed regulation stated:

> " * * * As a general rule, the procedures described in this subpart shall be applicable in those situations in which enforcement officials of the Department of Energy have been unable to readily ascertain the particular persons who are entitled to the refunds specified in * * * a consent order." (Notice of Proposed Rulemaking, 10 C.F.R. § 205.280, 43 F.R. 53256, 53257, November 15, 1978. Emphasis added.)

Under this proposed language, OHA might have been able to rationalize the denial of petitions on the grounds of cost or efficiency, but, given the wording of the adopted regulation, such flexibility is precluded.

The regulation as published does not contain the criteria on which OHA based the Forgotson and other petition denials, and provides no notice to interested parties that a denial is even possible. Mere expression of standards and criteria in a decision and order cannot replace publication. Thus, the uncompromising language of the final regulation is binding on OHA. See, e.g., United States v. Nixon, 418 U.S. 683, 695-696 (1974). As a result, OHA lacks legal authority to deny a peition filed by an enforcement official under the exisiting regulations. In our opinion, OHA should reconsider its past decisions and orders denying petitions for Subpart V procedures.

Solicitation of Public Comments

On September 10, 1980, OHA promulgated a Notice of Solicitation of Comments (45 F.R. 59627) on the manner in which consent order funds under the control of Energy should be distributed in Subpart V proceedings involving six sellers of petroleum products. In each of the cases, substantial sums had been transferred to Energy in settlement of alleged or litigated violations of Energy's price and allocation regulations. Further, no specific instructions for the distribution of the funds were contained in any of the consent orders, possibly because identification of specific purchasers entitled to refunds was believed to be unlikely. (Notice, 45 F.R. at 59629)

The Notice stated in pertinent part:

> "In view of these circumstances, it will be difficult to refund any of the Consent Order funds involved in these proceedings directly to particular purchasers of petroleum products. It therefore appears that alternative mechanisms for the distribution of the Consent Order funds may become essential and that the particular mechanisms chosen will be an important issue in these proceedings. See 10 C.F.R. § 205.287. Accordingly, we are soliciting comments from the public prior to the issuance of a Proposed Decision and Order in these matters. We are particularly interested in receiving suggestions as to alternative distribution mechanisms for the Consent Order funds involved in these proceedings. Comments may be of a general nature or specific, offering concrete proposals to the extent possible.

> "In addition, we solicit comments regarding the manner in which the Office of Hearings and Appeals can most effectively locate and identify firms or individuals that may be entitled to a portion of the Consent Order funds as a result of having been charged unlawful prices in sales of covered products. These comments should address how best to strike an appropriate balance between the costs of administering an effective refund proceeding and the rights of overcharged customers to refunds." (Notice, 45 F.R. 59629-59630)

Insofar as the Notice is intended to elicit practical means of identifying and locating overcharged purchasers, or appropriate classes of purchasers from each seller, and distributing the refunds to them, it is entirely appropriate. If, however, the Notice is an expression of OHA's predetermined conclusion that it will not attempt to identify and distribute the refunds to those actually overcharged, and is instead an effort to stimulate innovative ways of disbursing the funds to persons other than those entitled to refunds, then the Notice clearly is inconsistent with the terms and intent of its statutory authority and the Subpart V regulations. As we noted in the October opinion, OHA must attempt to identify overcharged individuals, since Energy's restitutionary powers are restricted to making distributions that are reasonably related to the alleged violations and the persons actually overcharged. (October opinion, p. 10)

The Subpart V regulations do not establish a precise mechanism for making distributions of refund moneys. They contemplate that OHA will formulate a distribution plan best suited to each case. Although the Notice is unclear as to what kinds of "alternative distribution mechanisms" OHA is seeking, it is clear that OHA may not adopt any distribution mechanism that is beyond the scope of its authority. Thus OHA may not lawfully implement any suggestion for "indirect" distributions to individuals lacking a reasonable nexus to the alleged violations.

For this reason, the Public Energy Trust proposal of the Consumer Energy Council of America, described in the Notice, may not be adopted by OHA because it would be inconsistent with the Subpart V regulations. Although section 205.284(a) of the regulations permits the Director of OHA to appoint "an Administrator" (not a group or entity) to evaluate applications for refunds, hold hearings, and issue orders, the regulations do not authorize OHA to delegate the responsibility for making distribution decisions to a nongovernment entity. Moreover, the proposal would permit using refunds "to finance projects designed to assist consumers in coping with energy costs," which is clearly beyond the scope of Energy's restitutionary authority.

Use of Consent Order Overcharge Funds
for OHA Administrative Expenses

In the section of the Subpart V regulations dealing with the custody and disbursement of consent order overcharge funds (10 C.F.R. § 205.287), there is a provision which states:

> "(b) All costs and charges approved by the Office of Hearings and Appeals and incurred in connection with the processing of Applications for Refund or incurred by an escrow agent shall be paid from the amount of funds, including interest, to be remitted pursuant to the Remedial Order or Consent order."

Another provision in the regulations permits these refunds to be used to compensate an administrator appointed by the Director of OHA (10 C.F.R. § 205.284(a)).

In our opinion, OHA may not use the refund moneys to pay these administrative costs. To use these funds for the purposes stated in the regulations would constitute an illegal augmentation of OHA's appropriations which are made expressly "[f]or necessary expenses in carrying out the activities of the * * * Office of Hearings and Appeals." (Department of the Interior and related agencies Appropriations, Fiscal Year 1981, Pub. L. No. 96-514, 94 Stat. 2957, December 12, 1980.)

It is a long-standing rule that, absent specific statutory authority to the contrary, an agency may use only its appropriation to meet the costs of its official functions. It may not augment its appropriation by using other funds to meet these expenses. See, e.g., 59 Comp. Gen. 294 (1980); 43 Comp. Gen. 101 (1963); 26 Comp. Dec. 43 (1919). The official duties of OHA include adopting and administering a procedure for the distribution of consent order refunds among others. (Memorandum Order of Acting Secretary of Energy, November 2, 1978, quoted in preamble to final Subpart V regulations, 44 F.R. 8562, 8563 February 9, 1979.) Thus, OHA cannot tap the vast reservoir of consent order funds to pay for its administrative expenses, but must utilize only its own appropriations as enacted by the Congress. Should the Subpart V proceedings prove to be so costly to administer that OHA's appropriations are inadequate, then its only recourse is to seek supplemental appropriations from Congress, or statutory authority to use the settlement funds for its expenses.

"Indirect" Distribution of Overcharge Fund Balances

In our October opinion, we held that, having failed to identify or attempt in any way to make refunds to customers who actually had been overcharged by Getty, Energy could not distribute the Getty Consent Order funds (through the states) to groups of low income users whose connection with the overcharged Getty customers is unknown. Even where attempts have been made to refund overcharges to injured purchasers, we do not think that Energy's restitutionary authority extends to making "indirect" distributions of the balance of overcharge funds to persons or organizations with no necessary nexus to the alleged violations which gave rise to the consent orders.

The October opinion thoroughly analyzed the statutory framework under which Energy operates, so this legislation need not be described in detail here. We pointed out that the only specific grant of restitutionary power in that legislation is found in section 209 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and is limited to actions which can be taken by the United States District Courts. (October opinion, pp. 3-4). We also stated that in Bonray Oil Co. v. Department of Energy, 472 F. Supp. 9 (W.D. Okla. 1978), aff'd per curiam, 601 F. 2d 1191 (TECA 1979), the court ruled that Energy's predecessor had the power only to order a violator of its regulations to make refunds to the customers it had overcharged. Energy's authority is similarly limited.

Energy and others have argued that Energy's restitutionary authority is far broader than our opinion allows, and regulations have been published which give OHA the option of disposing of undistributed overcharge funds in any way that it deems useful. Specifically, the regulation states:

> "(c) After the expenses referred to in subsection (b) have been satisfied and refunds distributed to sucessful applicants, any remaining funds remitted pursuant to the Remedial Order or Consent Order shall be deposited in the United States Treasury or distributed in any other manner specified in the Decision and Order referred to in Section 205.282(c)." (10 C.F.R. § 205.287(c). Emphasis added.)

Nowhere in Energy's enabling legislation is Energy's administrative remedial power delineated (other than granting it the power to issue "remedial orders"), nor is its responsibility regarding settlement funds set forth. Rather, the legislation contains broad statements of purpose and policy, similar to those expressed most recently in the Department of Energy Organization Act, 42 U.S.C. § 7101 et seq. For example:

"It is the purpose of this chapter—

(9) to promote the interest of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost;" (42 U.S.C. § 7112)

No authority is expressly granted to Energy--or to the administrative components of Energy responsible for the price and allocation programs—to promote the interests of consumers in general through direct payments to them or through grants made on their behalf to states or other entities. Nowhere in Energy's enabling legislation is there authority to utilize settlement funds in any way, and there certainly is no authority to expend these funds to establish or pay for a trust entity such as the Consumer Energy Council of America proposal--supported by the Special Counsel—contained in the September 10, 1980, Notice discussed above.

Energy and others have argued that the OHA distribution provision in Subpart V, quoted above, is an appropriate agency interpretation of Energy's power, since Energy, having resitutionary authority by virtue of the Bonray Oil decision, has ava'lable to it the full array of equitable remedies available to a court. We disagree.

The general rule is that deference should be given to interpretive regulations promulgated by the agency charged with carrying out a statute. E.g., Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971). Such deference is not to be given blindly, however, and the agency interpretation must be reasonable and consistent with the statute. See e.g., Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974). Even though the Secretary of Energy was given the broad discretion to prescribe such rules and regulations as may be deemed "necessary or appropriate" (42 U.S.C. § 7254), regulations issued under this authority must conform with the purposes and policies of the Congress and not contravene any terms of Energy's enabling legislation. See Real v. Simon 510 F.2d 557, 564 (5th Cir. 1975) and cases cited therein. If regulations go beyond the powers conferred on an agency by the Congress, they are void. Federal Maritime Commission v. Anglo-Canadian Shipping Co., 335 F.2d 255, 258 (9th Cir. 1964). Therefore, section 205.287(c) of the Subpart V regulations, insofar as it purports to grant to OHA the authority to use overcharge refunds to finance activities which OHA (or the Economic Regulatory Administration) is not authorized by statute to carry out, is not valid. The Congress did not grant broad equitable or restitutionary powers to Energy. Energy and OHA can exercise only those equitable powers specified in their legislation or in judicial interpretations of their legislative mandate. It is on this basis that we reiterate the holding in Bonray Oil, that Energy can effect restitution only to injured consumers of oil company products.

Energy, lacking the authority to freely dispose of these fund balances, can only deposit them in the Treasury to be held for a period of time for the benefit of possible claimants, and ultimately to be placed in the general fund. (October opinion, pp. 11-12). The deposit of undistributed funds in the Treasury as miscellaneous receipts, after all reasonable efforts have been made to identify--and to make refunds to--injured purchasers, does not amount to an "escheat" of the funds to the Government, as several consumer organizations have suggested. We agree that in a strict sense the funds do not "belong" to the Government initially, but rather are held by the Government for restoration to those actually injured by particular overcharges. At the same time, however, these funds do not "belong" to all consumers, or to a particular group of consumers unrelated to the alleged violations which produced the settlement. In our opinion, it would benefit no one to hold these funds indefinitely, and for this reason, after a reasonable time has been allowed for locating and reimbursing the intended distributees, the balances should be deposited in the general fund of the Treasury, to be used subsequently as directed by the Congress.

This position is in accord with the conclusion recently reached by the court in Citronelle-Mobile Gathering, Inc. v. O'Leary, 499 F.Supp. 871 (S.D. Ala. 1980). In that case, the court found that apportioning a recovery among countless injured energy consumers presented insurmountable difficulties. Rather than allow the petroleum dealers to retain the balance of undistributable overcharge funds, the Court ordered that restitution be made to the United States, stating:

> "*** Quite frankly, this court cannot envision a formula which could make a meaningful distribution to the millions of consumers from Florida to Massachusetts who purchased power or goods or services made or supplied from NEPCO's customers ***."
>
> * * * * *
>
> "This court concludes that in order to deprive the defendants of their illegal gain, restitution should be made to the United States Treasury. Because of the difficulties involved, no attempt will be made to apportion the recovery among the various levels of distribution injured by the defendants' violations. Realistically this holding very simply means that, since the people are sovereign, and where

> large numbers, here millions, have been injured, the peoples' institution, the United States Government, will recover the disgorged wrongful profits." (499 F.Supp. at 886).

This holding is equally applicable to the overcharge funds at issue here. Millions of customers of oil companies were overcharged and are entitled to recover a share of the consent order funds, but often no meaningful restitutionary distribution formula can be devised. Courts, which have broad equitable powers, have been able to fashion extremely complex resolutions to class action litigation where restitutionary distribution was required. For example, see West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D. N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir. 1971). However, Energy's extremely limited restitutionary authority permits only a resolution similar to that in Citronelle-Mobile, supra. We therefore again reach the conclusion that undistributed funds should be deposited in the general fund of the Treasury, where the "peoples' institution" will be responsible for their ultimate disposition.

Our decision is not intended to foreclose the options available to Energy in negotiating future consent orders. Our concern is the distribution of the unclaimed balances of consent order funds where no provision for such distribution has been included in a consent order. Energy may still negotiate consent agreements that provide for the establishment, by the oil company, of a trust or other entity to carry out agreed-upon projects or activities, provided the project is one that may lawfully be agreed to by Energy, and will not be financed by appropriated funds or overcharge refunds held in escrow. OHA may still develop restitutionary mechanisms that operate on an other than dollar-for-dollar refund basis, provided that there is a clear and unquestionable connection between the distributees and the overcharges for which the funds were paid. Anything that goes beyond this limited type of restitution, however, is not authorized, and Energy would need specific statutory authority to carry it out.

Alternatively, the Congress could establish a special fund in the Treasury into which undistributed consent order funds would be deposited after good faith efforts had been made to refund them. From this fund, the Congress could appropriate money for specific energy-related projects such as, for example, energy conservation programs, energy cost assistance for low-income persons, development of solar or geothermal energy technology, or for any other use specifically designated by Congress.

Distribution by the Special Counsel
of $4 Million to Charitable Organizations

In your latest letter, you questioned the legality of the highly-publicized distribution by Energy's former Special Counsel of $1 million to each of four charitable organizations. For the reasons discussed below, we believe that the former Special Counsel clearly exceeded his authority in making these distributions.

In our October opinion, we determined that by seeking to use Getty overcharge funds to carry out energy policies unrelated to its limited authority with regard to such funds, and by claiming for itself the unlimited right to determine the purpose for and the distributees of the funds, Energy was not acting as a trustee for the rightful owners, as had been asserted. Therefore, we concluded that Energy had no choice but to deposit the funds in the Treasury as miscellaneous receipts.

In the present instance, the funds at issue were part of a consent order between Energy and the Standard Oil Company of Indiana (Amoco), which provided that $100 million in overcharge funds would be disposed of in two ways. Paragraph 403 of the Order provided that the major portion of the funds, $71 million, was to be deposited in an escrow account under terms similar to the Getty Order, with disposition of this money to be left to the discretion of Energy. This $71 million is to be distributed by means of Subpart V procedures, and was one of the settlement funds for which public comment was sought concerning distribution mechanisms in the September 10, 1980, Notice.

Paragraph 404 of the Amoco Order provided that the remaining $29 million was to be distributed by Amoco to specified purchasers of large quantities of middle distillate products, with any unrefunded balance remaining at the end of 1980 to be deposited by Amoco into the escrow account established by Paragraph 403. We understand that approximately $4.2 million from the $29 million fund was not distributed by Amoco, but was deposited into the Paragraph 403 escrow account, and should have been retained there for distribution pursuant to OHA's pending decision and order. Instead, on January 19, 1981, the Special Counsel, who had sole access to the funds under the escrow agreement with the bank, directed that $4 million be distributed to four charitable organizations. The funds were then disbursed by the bank.

We are aware of no facts in this situation that warrant a conclusion different in any way from that of our October opinion, (the holding of which the Special Counsel had actual knowledge.) An official of Energy had decided to bypass agency procedures for distributing consent order funds, and to dispose of a portion of such funds in a manner of his own choosing. If, as we decided in October, Energy (including the Secretary

of Energy) may not lawfully distribute overcharge refunds in a nonrestitutionary manner and contrary to its own regulations, then clearly an officer of Energy, acting under a delegation of authority, likewise may not make such a distribution. Moreover, the specific delegation of authority to the Special Counsel precluded him from making distributions in any manner he chose.

The Special Counsel's authority derives from a delegation from the Administrator of the Economic Regulatory Administration in Delegation Order ~~No.~~ 0204-12, dated November 10, 1977 (a copy of which is attached for your convenience). The pertinent provision of this delegation order states:

> "The Special Counsel shall identify and investigate any apparent violations of applicable laws or regulations discovered in the course of audits conducted by him, or now known or suspected to exist, and shall initiate or cause to be initiated, and conduct or represent the Secretary of Energy in such administrative actions and/or legal proceedings, including appeals, as may be necessary in his judgment to remedy violations and to require the repayment of any identified overcharge to the customers affected by the same or, as appropriate, to the Treasury of the United States." (Delegation Order, p. 3. Emphasis added.)

We have been informally advised that this provision of the delegation order has never been amended or revised. The strictly limited authority of the Special Counsel with regard to the repayment of overcharges is explicitly stated in the delegation order. In ordering the payment of the $4 million to the charitable organizations, the Special Counsel knowingly exceeded that authority.

The only remaining question is what actions can be taken to correct this situation. We understand that Energy has agreed to accept a refund of $250,000 from each of the four charitable organizations involved in the Special Counsel's improper distribution. The remaining $3 million was disbursed by the organizations to needy persons they had determined were eligible to receive relief from burdensome heating costs.

Although we understand the agreements between Energy and the charitable organizations purport to fully settle the question of repayments by the organizations, in our opinion, Energy lacked the authority to effect such a compromise of the charities' liability for refund of the funds they erroneously received.

With respect to the liability of the former Special Counsel, we recognize that the monies involved were not appropriated funds of the United States. Nevertheless, we believe that the Special Counsel was an accountable officer under the terms of the escrow agreements with the banks, which gave him sole control over the disposition of the escrow funds.

In a recent decision, we held that any Government officer or employee, civilian or military, who by reason of his employment is responsible for, or has custody of, Government funds is considered to be an accountable officer. B-200108, B-198558, January 23, 1981 (copy attached). That case involved private funds paid into the registry of a Federal District Court. We held that the clerk of the court had custody of the funds, and therefore acted as an agent of the Government, and was accountable for those funds.

We have also held that where private funds are involved, the United States may have a sufficient interest by virtue of their being entrusted to, and accepted by, an accountable officer in his official capacity, to render them Government funds within the meaning of 31 U.S.C. § 82a-1 (under which accountable officers may be relieved of liability for the loss of Government funds). B-190205, November 14, 1977. (Copy attached).

The former Special Counsel, by virtue of his responsibility for and control over the private funds paid by the oil companies, was, in our view, an accountable officer. The United States obviously had sufficient interest in those funds, through the Special Counsel's acceptance of them, as well as through its duty to restore them to the rightful owners, to render them Government funds.

Therefore in our opinion Energy should attempt to collect from the four charitable organizations and the former Special Counsel the funds he improperly ordered to be disbursed by the bank (less the $1 million refund negotiated by Energy), under the Claims Collection Act, 31 U.S.C. § 951 et seq. In recognition of the novel issues raised here with regard to liability, we intend to refer this matter to the Department of Justice for its consideration in connection with any further action required.

When you release this opinion to Energy it will serve to inform Energy that we take issue with any failure to account properly for consent order funds either as reimbursements to appropriate persons

or groups, or as deposits in the Treasury within a reasonable time after institution of Subpart V procedures. It will also inform the Department that we take issue with the scope of remedial authority purported to be available to OHA under section 205.287(c) of the Subpart V regulations. Finally, it will inform Energy that we intend to refer this matter to the Department of Justice for consideration of an action against the former Special Counsel and the four charitable organizations for recovery of the $3 million.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosures

114959

Document Accession No. 516387

Released by Tom Garnett

Supplemental Opinion on DOE Plans for Retrieval

4/10/81

(516387)

4/20/81