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Comptroller General
of the United States

Washington, D.C. 20548

B-262234

December 21, 1995

The Honorable Bud Shuster
Chairman, Committee on Transportation
and Infrastructure
House of Representatives

Dear Mr. Chairman:

This is in response to your letter of July 12, 1995, concerning the activities of Mr. Edward Perry, an employee of the Fish and Wildlife Service (FWS), Department of Interior (DOI). On April 5, 1995, he participated in an Altoona, Pennsylvania, press conference sponsored by a private environmental group, Clean Water Action, to criticize pending legislation amending the Clean Water Act. Section 303 of the Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2536 (1994), contains the following restriction: "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete." You ask whether the FWS employee's participation in the press conference violated section 303 of the Interior Appropriations Act. For the reasons explained below, we conclude that the employee's conduct constituted a violation.

Background

On April 4, 1995, Ms. Paula Ford, a member of the Juniata Valley Audubon Society, received a fax from Clean Water Action, a private environmental group. The document[1] announced an April 5, 1995, press conference in Altoona, Pennsylvania,

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[1]The document, a press advisory reads in part, as follows:

> "Altoona Residents to Join Pennsylvania Environmental Groups in Press Conference to Criticize Bud Shuster's 'Dirty Water' Bill"

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to criticize H.R. 961,[2] a bill to amend the Clean Water Act. Clean Water Action's press conference coincided with active consideration[3] of the bill by the House Committee on Transportation and Infrastructure, chaired by Representative Bud Shuster.

About one-half hour after receiving the fax, Ms. Ford telephoned Mr. Edward Perry, Assistant Supervisor, FWS, Pennsylvania Field Office, State College, Pennsylvania, to ask him to speak at the press conference. Ms. Ford told him that Clean Water Action had called a press conference to discuss H.R. 961, that speakers at the event would criticize the legislation, and that she wanted him there to present a balanced scientific viewpoint. As far as we know, Ms. Ford was Mr. Perry's only direct source of information regarding the event.

Mr. Perry did not consider it unusual to be asked to speak at a press conference because public outreach is part of his job. Among other tasks, he provides advice and assistance to the public on matters related to wetlands. In this capacity, over the last year he made 14 speeches and spoke with about 20 reporters. Additionally, during his tenure at FWS he has appeared on radio and television between 15 and 20 times.

After checking with his supervisor, Charles Kulp, FWS, Pennsylvania Field Office Project Leader, Mr. Perry agreed to appear and make a presentation. Although both employees were concerned that the Assistant Supervisor not engage in lobbying, they believed that the applicable law only prohibited a government official from asking constituents to contact Congress.[4] While Mr. Perry and Mr. Kulp were aware

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[2]Congressman Bud Shuster, whose district includes Altoona, Pennsylvania, introduced H.R. 961.

[3]The Committee considered the bill and amendments to it from April 4 through April 6, 1995, when it was ordered reported to the House.

[4]Neither the FWS, nor DOI, provide any written guidance to employees on section 303. In March 1995, in anticipation of requests for comment from the public, Mr. Perry called the DOI Regional Solicitor's office to find out what he could say about the Clean Water Act amendments then introduced in Congress. He was advised that as a government employee he could not ask anyone to contact his or her Congressman or Senator about pending legislation. He was not informed of the existence of section 303.

that DOI[5] and the Environmental Protection Agency[6] opposed the legislation, we found no evidence that the speech was part of a concerted effort by the Department to generate opposition to the legislation. On April 5, 1995, before Mr. Perry went to the press conference, Mr. Kulp reviewed and approved his statement.

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[5]George T. Frampton, Jr., Assistant Secretary for Fish and Wildlife and Parks, DOI, set out the Department's official position on H.R. 961 in a letter dated April 3, 1995, to Chairman Bud Shuster. The letter maintained that the bill

> "would completely undermine the successes we have achieved under the Clean Water Act at reducing the rate of wetland loss in this country. These provisions would cripple our ability to protect the Nation's wetlands."

The Assistant Secretary urged the Committee Chairman

> "to delay consideration of this legislation until we can more fully discuss the implications of this title on our Nation's wetlands and those who benefit from the irreplaceable functions they serve."

[6]Carol M. Browner, Administrator, U.S. Environmental Protection Agency, set out the Agency's official position on H.R. 961 in a letter dated March 22, 1995, to Chairman Bud Shuster. The letter expresses the Administration's "deep concern about the Clean Water Reauthorization bill released by your committee today," because in EPA's view the bill

> "undermines twenty years of success in our Clean Water programs, and weakens the commitment to achieving strong environmental and public health protections for the American people."

The Administrator further stated that

> "this bill is not in the best interests of the American people and is unworkable. It exempts important sources of pollution, prohibits states from controlling certain discharges, and undermines good science. . . . The Clean Water Act is a highly workable and effective statute and this bill would roll back longstanding public health and environmental protections."

When Mr. Perry got to the press conference he saw banners that said, "This Bud is not for you,"[7] a reference to Congressman Shuster, sponsor of H.R. 961. At least four other speakers at the press conference, including Ms. Ford, criticized the Clean Water Act amendments.[8] The Assistant Supervisor did not deviate from his prepared remarks that are reproduced here in their entirety:

> "My name is Edward Perry, I am the Assistant Supervisor of the United States Fish and Wildlife Service's field office in State College, Pennsylvania. We have reviewed Title VIII of HR 961 and agree with the Environmental Protection Agency's assertion that the proposed Bill will exclude from protection many important wetlands, such as portions of the Great Dismal Swamp and the Florida Everglades. Here in Pennsylvania, this Bill would nearly eliminate the federal government's ability to protect wetlands. For example, we estimate that by using the Bill's new wetland definition, about 70% or 231,000 acres of wetlands would be eliminated from protection. Since wetlands comprise only 1½% of Pennsylvania's 26 million acres of land, it does not seem reasonable to eliminate such a scarce resource, particularly when the consequences are increased flooding, reduced water quality and the elimination of high quality fish and wildlife habitat. In 1993, citizens in the Missouri and Mississippi River watersheds experienced first hand the loss of life and property that eventually results when wetlands and floodplains are eliminated. Over time, over 17 million acres of wetlands were eliminated from those two river basins. The amount of water stored in these wetlands would have filled a thousand football fields to a depth of 4½ miles. Given the adverse impacts on the public from misusing this scarce and declining resource, we cannot afford to roll back[9] protection for a resource that has protected the quality of our water, prevented floods and serves as habitat for our Nation's fish and wildlife resources. "

While it appears that Mr. Perry answered one question from the audience during the press conference, that question did not relate to the pending legislation. The press conference received local print and broadcast media coverage in Altoona.

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[7]The Assistant Supervisor told us that he was not surprised by the appearance of the banners in the room.

[8]One person at the press conference did not discuss H.R. 961. He discussed the harm to his trout hatchery from runoff caused by a road project.

[9]The Altoona television station picked up the phrase "roll-back" and used it in a news piece discussing the pending legislation, "Representative Bud Shuster is chairing an effort to roll-back Clean Water Regulations . . . ."

The Department of Interior has agreed that the Assistant Supervisor was speaking as a government employee and that DOI expended appropriated funds for the purpose.

Analysis

Since 1919, Congress has passed one criminal provision[10] and a number of appropriations act limitations regulating lobbying by public officials. The broadest of these restrictions,[11] section 303 of the Interior Appropriations Act, Pub. L. No. 103-332, 108 Stat. 2499, 2536 (1994), reads as follows:

> "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete."

The provision's legislative history parallels the wording. In 1978, when Congress first enacted what is now section 303, there were already criminal and civil provisions in place to prevent the executive branch from engaging in grass roots lobbying of Congress.[12] The Department of Justice and this Office interpreted these

[10]Third Deficiency Appropriation Act, fiscal year 1919, ch. 6, § 6, 41 Stat. 68 (1919) (codified at 18 U.S.C. § 1913).

[11]Other, more limited appropriation act restrictions on lobbying activities may be found in the Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8001, 108 Stat. 2599, 2616 (1994), and the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriation Act, 1995, Pub. L. No. 103-333, § 504, 108 Stat. 2539, 2572 (1994).

[12]At the time Congress enacted what is now section 303, 18 U.S.C. § 1913 had been in existence for almost 60 years. The Office of Legal Counsel of the Justice Department has interpreted section 1913 to prohibit "large-scale publicity campaigns to generate citizen contacts with Congress on behalf of an Administration position with respect to legislation or appropriations." Memorandum for Dick Thornburgh, 13 Op. Off. Legal Counsel 361, 368 (September 28, 1989) (prelim. print).

In addition there was already a governmentwide restriction in the Treasury, Postal Service, and General Government Appropriations Act of 1979 prohibiting the use of any appropriated funds for publicity or propaganda purposes designed to support or defeat pending legislation. That provision reads as follows:

provisions to prevent government officials from explicitly asking members of the public to contact their elected representatives in support of or in opposition to pending legislation.

The committee report accompanying what ultimately became section 303 states that this section was added to the Interior and Related Agencies Appropriation bill in 1978 because of "certain public information activities being conducted by the National Park Service, Fish and Wildlife Service, and Forest Service that tend to promote pending legislative proposals to set aside certain areas in Alaska for national parks, wildlife refuges, national forest and other withdrawals." S. Rep. No. 276, 95th Cong., 1st Sess. 4-5 (1977). The particular public information activities that the Committee objected to were, "[c]olorful brochures printed and actively distributed by these agencies" extolling the benefits of legislative proposals to set aside land for national parks and wildlife refuges. Id. at 5. Accordingly, the Committee considered these activities, "to be in violation of the intent, if not the letter, of the Act of June 25, 1948 (Title 18 U.S.C. § 1913)." Id. Finally, the Committee cautioned that the language added "should not be construed as an impediment on the agencies' ability to respond to public information inquiries." Id. To prevent these agencies from engaging in similar conduct in the future, Congress added what is now section 303 to the 1979 Interior and Related Agencies Appropriations Act. Every Interior appropriations bill since has included a nearly identical provision.

We have read section 303 as applying to situations not reached by other appropriations restrictions.[13] Thus, like these other provisions, this section applies to grass roots lobbying;[14] however, unlike the other provisions, there is no

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> "No part of any appropriation contained in this or any other Act, or of funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. No. 95-429, § 607(a), 92 Stat. 1001 (October 10, 1978). We had long interpreted this lobbying restriction to require a direct appeal to the public to contact Congress on pending legislation. B-114823, Dec. 23, 1974.

[13]59 Comp. Gen. 115, 119 (1979).

[14]None of these statutes apply to direct contact with Congress by executive branch officials.

requirement that the agency explicitly appeal to the public to contact Congress.[15] Rather, section 303 has a broader reach, covering not only explicit but also implicit appeals to the public designed to promote public support for or opposition to pending legislation.

We have previously applied this analysis in two cases involving the National Endowment for the Arts' (NEA) use of appropriated funds. In the first case, GAO found that the NEA's mass mailing of information packets on the "Livable Cities Program" violated what is now section 303. 59 Comp. Gen. 115 (1979). The packets contained a cover letter[16] stressing the fact that Congress had yet to approve program funding and a newspaper account of the funding debate. NEA timed its mailing to coincide with reconsideration of the program's appropriations after the conference committee failed to agree on funding. While NEA sent the packets to people who had expressed an interest in the program during the year, we found that it was "improbable that all of the hundreds of inquiries had in fact requested a later 'update'." Further, we also found that the information focused on reconsideration of program funding and by implication advocated support of that funding. Accordingly, we rejected NEA's argument that it was simply responding to public concern about the level of program funding and concluded that NEA's packet tended to promote public support for congressional approval of funding for the Livable Cities Program.

The second case[17] also involved the language of section 303 in an earlier appropriation act, and concerned an NEA official who made a presentation at an arts management conference on NEA's structure and functions and the status of its reauthorization. The speaker had informed the audience that she could not advise them to take particular actions in support of NEA. After her presentation she took questions from the audience. One of the questions concerned what members of the audience could do to support the Endowment. The speaker responded by saying

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[15]B-239856, April 29, 1991; B-226449, April 3, 1987; see, Alleged Unauthorized Use of Appropriated Moneys by Interior Employees, CED-80-128, B-198488, August 13, 1980; 59 Comp. Gen. 115 (1979).

[16]The decision highlighted the following language contained in the cover letter:

> "We share your interest in the outcome of the House vote which incidentally could come at any time after Congress reconvenes on September 5th. If the outcome is favorable, guidelines/regulations would be issued as soon as possible thereafter."

[17]B-239856, April 29, 1991.

that they could contact their elected representatives. She later told us, and others corroborated her statement, that the answer was more in the nature of a civics lesson than an exhortation to contact the Congress. We did not find a violation in this case because we concluded that the speaker's activity did not tend to promote public support or opposition to pending legislation.[18]

As discussed above, section 303 was not intended to be "an impediment on the agencies' ability to respond to public information inquiries." S. Rep. No. 276, 95th Cong., 1st Sess. 5 (1977). Thus, in interpreting the restriction we concluded that:

> "There is a very thin line between the provision of legitimate information in response to public inquiries and the provision of information in response to the same requests which 'tends to promote public support or opposition' to pending legislative proposals. There is little guidance for the agencies concerned in either the language or the legislative history of section [303]. For example, a literal reading of the section might make it impossible for an agency to provide even a strictly factual response to a question about the status of its program's appropriation, since a statement that the appropriation was awaiting resolution by a conference committee might well stimulate the reader to write to his congressman on behalf of the resolution he prefers."

59 Comp. Gen. 115, 119-120 (1979). In the absence of congressional wishes to the contrary, we have therefore construed the restriction in light of what we believe the Congress probably intended—that it does not prohibit public statements that are "strictly factual and devoid of positive or negative sentiment" about pending legislation. Id.

Here, Mr. Perry used appropriated funds to participate in a press conference sponsored by Clean Water Action. Clean Water Action called the press conference to: coincide with the legislation's active consideration in committee; attract public attention; link in the public mind the legislation and its sponsor Congressman Shuster, who was also Chairman of the Committee considering the legislation and represents the district which includes Altoona; and criticize H.R. 961. In this context, we conclude that Mr. Perry's allegation of negative consequences that would result from enactment of H.R. 961 tended to promote public opposition to a legislative proposal, so that the expenditure of appropriated funds for this activity (Mr. Perry's transportation and salary) constituted a violation of section 303.

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[18] "[S]he made the remark spontaneously in response to questions from the audience, and members of the audience perceived her statement as being informational rather than encouraging any action on their part." B-239856, April 29, 1991.

Department of Interior's Opinion

In a letter dated September 25, 1995, the Department of the Interior provided us with their understanding of Mr. Perry's actions in light of section 303 and our prior decisions. The Department advocates interpreting section 303 the way that this Office interprets less broadly worded, anti-lobbying provisions.

The Department bases its suggested interpretation of section 303 on a misreading of the section's legislative history. The Department states that: ". . . the committee forthrightly acknowledged that the intent, ' if not the letter,' of section 303 was the same as that of the criminal Anti-Lobbying Act, 18 U.S.C. § 1913." The Senate Committee's actual words state that Fish and Wildlife Service activities violated the intent if not the language of section 1913. In our view, Congress intended section 303 to cover situations not already covered by section 1913 and presumably its civil equivalent section 607(a).

Although the Department refers to our 1979 opinion, 59 Comp. Gen 115, it does not address the opinion's conclusion that section 303 deals with lobbying that "stops short of actually soliciting the reader to contact his Congressman." Id. at 120. The cases and audit reports cited by the Department make the point that while section 303 applies to everything covered by section 607(a), it also includes implicit appeals to the public to contact Congress in support of or opposition to pending legislation.

DOI states, and we agree, that when Congress amended section 303 in 1982 to eliminate the reference to 18 U.S.C. § 1913, it did not change the reach of the statute. We would go further. Prior to the time Congress eliminated the reference to section 1913 in what is now section 303, we had issued an audit report and an opinion construing the provision more broadly than either section 607(a) or section 1913. The audit report and the opinion were in response to requests of Members of the appropriations committees where the amendment to section 303 originated. If Congress believed our prior interpretation to be erroneous, then it had an opportunity to correct it. It did not do so. Rather, it amended what is now section 303 in a way that is consistent with our prior interpretation. We see no reason now to restrict the meaning of the statute.

Finally, we note that the Department of Justice has historically expressed the view that the President's constitutional role in the legislative process includes the duty to communicate with the citizens of the United States on matters that relate to legislation. E.g., Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to Attorney General Dick Thornburg, September 28, 1989 ("Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts"). Most recently, "Anti-Lobbying Act Guidelines" issued on April 17, 1995, by the Office of Legal Counsel, Department of Justice, stated that lobbying activities may not be limited when: ". . . personally undertaken by the President, his aides and assistants within

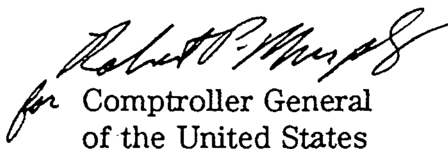
the Executive Office of the President, the Vice President, cabinet members within their areas of responsibility, and other Senate-confirmed officials appointed by the President within their areas of responsibility."

In this connection, the Department of the Interior has not suggested that constitutional issues are implicated here, and Mr. Perry is not a political appointee or presidential aide generally referred to by the Department of Justice in its discussions of executive branch employees whose lobbying activities are constitutionally protected. In any event, we presume the constitutionality of all federal laws until the courts say otherwise. B-248111, April 15, 1993.

We understand that the Department of Interior is drafting guidelines for departmental employees to avoid violations of section 303 in the future.

We trust that this has been responsive to your inquiry.

Sincerely yours,



for Comptroller General
of the United States