



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

Director
522/30

B-207186

May 5, 1982

The Honorable Richard L. Ottinger
Chairman, Subcommittee on Energy
Conservation and Power
Committee on Energy and Commerce
House of Representatives

do not make available to public reading

Dear Mr. Chairman:

This responds to your letter dated April 26, 1982, in which you asked that we address the issues outlined in your April 13 letter. (Your April 13 letter asked that we testify at an April 30 hearing, which subsequently was postponed indefinitely.) The issues concern the legality of an impoundment of funds appropriated for the Solar Energy and Energy Conservation Bank, and the relevance of sections 516 and 517 of the Energy Security Act and section 1001(4) of the Impoundment Control Act.

ESTABLISHMENT OF THE BANK

The Bank was established on June 30, 1980, by title V of the Energy Security Act of 1980. Title V, known as the Solar Energy and Energy Conservation Bank Act of 1980, provides that the Bank will be governed by a Board of Directors consisting of the Secretaries of Housing and Urban Development (HUD), Energy, Treasury, Agriculture, and Commerce. The Secretary of HUD is the chairperson. Subject to the Board's direction, the Bank's affairs are to be managed by officers consisting of a Presidentially appointed President, and two Executive Vice-Presidents appointed by the Bank President. However, as a result of the impoundment actions described below, the Bank does not have its officers, nor have its regulations been issued. In other words, the Bank is not presently operational.

Fiscal Year 1982 Funding and Presidential Impoundments

Congress' passage of the first continuing resolution for fiscal year 1982 appropriated on a yearly basis \$25 million for the Bank. Since the continuing resolution was in effect for 14 percent of the fiscal year, OMB recognized 14 percent of the appropriation, or \$3.5 million, as available for apportionment. However, since the Administration had proposed no funding for the Bank in fiscal year 1982, OMB did not apportion any of

these funds, and the President submitted deferral D82-184 for that amount to the Congress on October 29, 1981. In his special message, the President stated that the deferral was necessary to preserve funding level options until Congress completed action on a permanent appropriation bill.

This deferral remained in effect until January 22, 1982. During this time, on November 23, 1981, the second continuing resolution was enacted to extend the earlier resolution for an additional 7 percent of the fiscal year, or until December 15, 1981. As a result, an additional \$1.75 million was recognized by OMB as available for apportionment to HUD for the Solar Bank. However, deferral D82-184 was not amended to reflect this increase available in appropriations. Therefore, under OMB's procedures, the \$1.75 million technically was available for obligation by HUD. 1/

Later during the period the deferral was in effect, on December 23, 1981, the HUD Appropriation Act was enacted. It provided \$23 million for the Bank which would remain available until September 30, 1983. The Office of Management and Budget (OMB) then reduced the appropriation by 5 percent, or \$1.15 million, under section 501 of the appropriation act. This left an appropriation of \$21.85 million for the Bank. 2/

1/ OMB Bulletin 82-1, October 7, 1981, as supplemented by an OMB memorandum dated December 3, 1981, provided guidance for apportionment of funds appropriated by the first two continuing resolutions for fiscal year 1982. Those documents provide that if funds recognized by OMB as available for apportionment are neither deferred nor formally apportioned by OMB, those funds are considered apportioned automatically.

2/ Section 501 of the HUD Appropriations Act incorporates section 140 of H.J. Res. 357, as passed by the Senate on November 20, 1981. Section 140 requires that the total budget authority provided for payments not required by law be reduced by 4 per centum. Section 140 restricts the allocation of this reduction by providing that of the amount provided for each appropriation account, activity, program, or project, the amount reduced shall not exceed 5 percent. OMB applied the maximum reduction authorized to the Solar Bank account.

OMB did not take apportionment action in response to this appropriation until January 22, 1982. At that time, OMB replaced the \$3.5 million deferral with a proposed rescission and withheld the \$21.85 million.

On February 5, 1982, the President submitted the proposed rescission (R82-22) to Congress. In his special message, the President stated that enactment of the rescission proposal would terminate the Bank's activities.

GAO Impoundment Reports on the Solar Bank

On December 31, 1981, GAO issued its report on the President's October 29 special message containing the deferral for the Solar Bank. In that report, we concluded that the deferral was unauthorized based on section 1001(4) of the Impoundment Control Act, commonly referred to as the fourth disclaimer. The fourth disclaimer provides that the Impoundment Control Act does not supersede any provision of law requiring the obligation or expenditure of budget authority.

We examined sections 516 and 517 of the Energy Security Act and determined that those sections require that a specified percentage of the funds appropriated be provided for the financial assistance authorized under the Act. Therefore, we concluded that sections 516 and 517 fell under the fourth disclaimer as provisions of law requiring the obligation of budget authority. As such, we further concluded that the fourth disclaimer precluded the deferral, and recommended that the deferral be disapproved as unauthorized.

The view of the fourth disclaimer contained in our December 31 report is consistent with the position we previously had taken in several other reports. That view recently was challenged by OMB in connection with an impoundment of funds appropriated under the Libraries Services and Construction Act. In light of this disagreement, we issued an impoundment report on March 10, 1982, which affirmed our earlier position and explained in detail the legal basis for our interpretation of the fourth disclaimer.

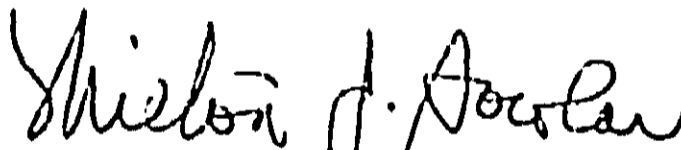
Notwithstanding our December 31 opinion on the propriety of withholding Bank funds, and our March 10 opinion on the fourth disclaimer, OMB withheld the Bank's funds incident to the February 5 rescission proposal during the 45-day withholding period normally applicable to rescission proposals under the Impoundment Control Act. That 45-day period ended on April 23,

1982, and OMB apportioned the funds to HUD on April 26, 1982. Therefore, the issue of the legality of OMB's withholding of the Bank's funds now is academic.

The Impoundment Control Act requires that funds withheld pending rescission be made available for obligation at the end of the prescribed 45-day period. OMB complied with that legal requirement when it released the funds to HUD on April 26, 1982. It is now incumbent on HUD to likewise make those funds available for obligation.

The impoundment actions taken during the past year have had the effect of the Bank not becoming operational. Therefore, while the Impoundment Control Act requires that these funds be made available for obligation, we recognize that it may not be possible for HUD to immediately obligate the funds. HUD will not be in the position to actually obligate funds until it takes those preparatory steps which will make the Bank operational and ultimately lead to the obligation of funds. These steps include the appointment of bank officers and the issuance of regulations providing for program requirements. Prudent and expeditious discharge of these responsibilities, followed by HUD providing the financial assistance required by sections 516 and 517 of the Energy Security Act, will satisfy the requirements of the Impoundment Control Act and the Energy Security Act.

Sincerely yours,



Acting Comptroller General
of the United States