

Memorandum

LIMITED DISTRIBUTION

Date: July 25, 1988
To: Associate Director, AFMD/FA - Robert W. Gramling
Thru: Associate General Counsel - Richard R. Pierson
From: Senior Attorney, OGC - Jeffrey A. Jacobson

Subject: Legal Issues Related to EPA's Fiscal Year 1987
Financial Statements (Code 917137; B-216351)

This responds to questions 4, 5, and 6 of your February 18, 1988, memo regarding the indemnity payments made to pesticide owners under section 15 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136m (1982). Specifically, you ask whether the 1988 continuing resolution requires that all indemnity payments made in fiscal year 1988 be from the Judgment Fund rather than from Environmental Protection Agency (EPA) appropriations, regardless of when EPA became liable for such payments. If not, you ask when EPA liability occurs and should the liability be recorded as an obligation against prior year appropriations.^{1/}

The continuing resolution for fiscal year 1988 provides that none of the funds appropriated in the act are available for FIFRA indemnity payments. Pub. L. No. 100-202, 101 Stat. 1329-199, December 22, 1987. The permanent indefinite appropriation (Judgment Fund) is available to pay final judgments, awards, and compromise settlements when payment is not otherwise provided for. 31 U.S.C. § 1304(a) (1982).

Liability to pay a FIFRA indemnity claim arises when (1) a final decision is reached that a claimant is eligible for an indemnity payment, and (2) a final determination is made on how much the claimant is entitled to receive. While court decrees and EPA or Justice Department settlement agreements

^{1/} After consultation with David Grindstaff and John Reilly of your office on March 11, 1988, and because the enumerated questions are closely related, we agreed that the questions would be addressed collectively.



are the best evidence that a claim has been finalized, each claim is unique and requires a case-by-case examination. This memorandum is designed to help you identify when a liability to pay arises, and the appropriation source available to make payment.

FIFRA claims generally should be obligated against and paid from the available appropriation for the fiscal year in which the claims are finalized. However, we will not object to the Judgment Fund being used for FIFRA indemnity claims finalized during fiscal year 1988 since EPA is prohibited from using the funds appropriated in the fiscal year 1988 continuing resolution for FIFRA indemnity payments and the committee reports on the continuing resolution direct the use of the Judgment Fund for such payments. With respect to claims finalized before fiscal year 1988, whether funds are available for the applicable prior year and, if not, whether the Judgment Fund may be used for such claims without congressional action are questions that should be addressed in the context of the specific facts and circumstances surrounding individual claims.

BACKGROUND

Section 15 of FIFRA, 7 U.S.C. §136m, provides that when EPA exercises its imminent hazard authority and suspends or subsequently cancels a pesticide's registration, pesticide owners shall be compensated by the federal government for their loss resulting from EPA's action.^{2/} Except for pesticide producers,^{3/} owners of a cancelled or suspended pesticide need only demonstrate that they suffered a loss by reason of the EPA action to be eligible for a FIFRA indemnity payment. Section 136m(a) states that the EPA

^{2/} EPA expenditures for storage and disposal of cancelled pesticides are covered under 7 U.S.C. §136q (1982), and therefore are not considered indemnity payments.

^{3/} In order to qualify for an indemnity payment, a pesticide producer must notify EPA or discontinue production of the subsequently suspended or cancelled pesticide if it learned of facts giving rise to the need for suspension or cancellation. 7 U.S.C. §136m(a).

Administrator is then empowered to make an indemnity payment to the pesticide owner.^{4/}

The issue of EPA assuming the financial burden for FIFRA indemnity payments through the use of its appropriation is not new. See Payment of Judgments under 7 U.S.C. §136m, B-217990.31-O.M., Jan. 11, 1988. While Congress did not specify a funding source in section 15 of FIFRA, the statutory directive that the EPA Administrator make the indemnity payments implies that the funds for such payments should come from ERA's appropriations. However, because Congress never provided EPA with a specific authorization or appropriation for indemnity payments, and EPA believed there were significant practical and policy problems attendant to obtaining such funding, the option of making payment from the Judgment Fund occurred. Background Report for the Indemnification Report to Congress, U.S. EPA, Office of Toxic Substances, EPA 560/4-83-002, p. 36, December 1983.

To shift responsibility for FIFRA indemnity payments to the Judgment Fund, EPA entered into settlement agreements with pesticide owners but notified the parties that EPA had no funds to make payment. Pesticide owners therefore brought actions for payment in Claims Court which EPA referred to the Justice Department to defend or settle. If a judgment was entered against the government either as a result of litigation or the Justice Department entering into a compromise settlement,^{5/} payment came from the Judgment

^{4/} The amount of the payment is described in 7 U.S.C. §136m(b)(1), which states:

"In General. - The amount of the indemnity payment under subsection (a) of this section to any person shall be determined on the basis of the cost of the pesticide owned by such person immediately before the notice to the registrant referred to in subsection (a)(1) of this section; except that in no event shall an indemnity payment to any person exceed the fair market value of the pesticide owned by such person immediately before the notice referred to in subsection (a)(1) of this section."

^{5/} Settlements on Claims Court cases historically were reduced to judgments because of GAO's policy to require such judgments before certifying Claims Court settlements for payment from the Judgment Fund. Our
(continued...)

Fund. Background Report for the Indemnification Report to Congress, supra, at 36.

In late 1984, the Justice Department informed EPA that the Judgment Fund would no longer be available for FIFRA indemnity payments. The Washington Post, Sept. 24, 1984, at A17, col. 2. We understand that EPA subsequently used its appropriations to make some indemnity payments. However, the continuing resolution prohibits the use of EPA's fiscal year 1988 appropriation for FIFRA indemnity payments.

The legislative history of the prohibition in the continuing resolution reflects a congressional concern that indemnification claims could exceed the entire budget of the pesticide program. H.R. Rep. No. 189, 100th Cong., 1st Sess. 31 (1987). The prohibition was designed to protect the pesticide and other operating program budgets by shifting financial responsibility for indemnity payments to the Judgment Fund until other indemnification issues were addressed in the reauthorization process. Id. The intended effect of the prohibition on the process for making indemnity payments was outlined in the conference report on the continuing resolution:

"The conferees want to make clear that this provision is not intended to change the responsibility of the U.S. Government for indemnification. The conferees understand that claims for indemnification will continue to be submitted by claimants to EPA. The Agency should continue to conduct the technical review of such claims in an expeditious manner to determine the validity of amounts claimed. Claims will then be referred by EPA to the Department of Justice under 28 U.S.C. 2414 for settlement (or for litigation if the liability or amount are disputed by the Government) and paid pursuant to 31 U.S.C. 1304.

5/ (...continued)

policy was based on the absence in 28 U.S.C. §2517 of the explicit authority to certify Claims Court settlements found in 28 U.S.C. §2414 with regard to District Court settlements. We recently reconsidered our policy and, although not specifically provided for by 28 U.S.C. §2517, agreed to certify for payment from the Judgment Fund compromise settlements entered into between a claimant and the Justice Department at the Claims Court level. Payment of Settlement Agreement Without Judgment in Court of Claims Cases, B-217990.27-O.M., Sept. 9, 1987.

The conferees expect that claims which EPA deems valid should be processed routinely by the Justice Department and that approved claims should be paid promptly from the Judgment Fund of the Treasury."

H.R. Rep. No. 498, 100th Cong. 1st Sess. 852 (1987)

DISCUSSION

You asked whether the 1988 continuing resolution requires that all indemnity payments made in fiscal year 1988 be from the Judgment Fund rather than from EPA appropriations, regardless of when EPA became liable for such payments. To fully address the issues presented by your question, we first discuss when claims against the United States generally and FIFRA claims specifically become legal liabilities that must be recorded as obligations and the appropriation against which such obligations may be charged. We then discuss the effect of the continuing resolution on FIFRA claims for which a legal liability arose in fiscal year 1988 and in prior years.^{6/}

Obligations for Claims Against the Government Generally

As a general rule, a claim against an agency should be obligated against and paid from an appropriation available for the fiscal year in which the amount of the claim was determined and allowed. Damages Caused by American Forces Abroad, 1 Comp. Gen. 200 (1921); 18 Comp. Gen. 363 (1938).^{7/} This principle is codified in 31 U.S.C. § 1502 (1982), which indicates the importance of determining the date the claim and hence an obligation was incurred:

^{6/} The House-passed version of the Department of Housing and Urban Development-Independent Agencies Appropriation Bill, 1989, contains the same prohibition contained in the 1988 continuing resolution. H.R. 4800, 100th Cong., 2d Sess. 28 (June 24, 1988). If the prohibition is enacted into law, it will have the same effect as the 1988 continuing resolution.

^{7/} Other claims may be treated differently. For example, an employee's claim for back pay generally will be prorated among the applicable years the employee worked.

"(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law."

Section 1501 of title 31 states, in part:

"(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of -

. . . .

"(6) a liability that may result from pending litigation; [or]

. . . .

"(9) other legal liability of the Government against an available appropriation or fund."

Because sections 1501 and 1502 mean that the date the claim becomes a legal liability and thus is recognized (and usually recorded) as an obligation determines the fiscal year appropriation to be used to pay the claim, it is important to understand what events convert a claim to a legal liability.

A claim is obligated against, and payment on a claim made from, appropriations current at the time final action on the award of the claim creates a legal liability of the United States. See Bureau of Land Management - Reimbursement of Contract Disputes Act Payments, 63 Comp. Gen. 308 (1984).
As we said there:

"This rule is grounded on the theory that the court or administrative award 'creates a new right' in the successful claimant, giving rise to new Government liability. Accordingly, 'there is no obligation on the part of the United States for payment of any amount on a claim until a final determination of the Government's liability is made' by the designated authority." (citations omitted)

63 Comp. Gen. 308, 310.

Thus, a claim becomes a legal liability once a final determination of award on the claim has been made. At this point, an obligation has been created that must be charged against the appropriation available at the time. The payment to liquidate that obligation will be made from the appropriation.

Obligations for FIFRA Indemnity Claims

A final determination of the government's liability for a FIFRA indemnity payment means a resolution of all eligibility and payment issues surrounding the claim. Eligibility issues are resolved either by an agreement between EPA and the pesticide owner where eligibility is not disputed^{8/}, or by the disposition of a judicial or other external review of the claim where eligibility is disputed. The amount of the indemnity payment also may be resolved by the settlement agreement. The agreement will be dispositive of such eligibility and payment issues so long as it is within the scope of FIFRA. See Black Leaf Products Co. v. United States, 4 Cl. Ct. 307 (1984) (where Government unsuccessfully sought to disavow the settlement agreement entered into with owner).

This approach for determining that a legal liability exists which is ripe for recording as an obligation under 31 U.S.C. § 1501(a)(6), (9), rejects an accounting or contingent liability method for matching claim liability to a specific fiscal year. That is, factors giving rise to the FIFRA claim (e.g., suspension or cancellation of pesticide registration) are not relevant for determining the fiscal year source of appropriations to be used in paying the claim. Instead, one looks to see when the government and the pesticide owner finally resolved any questions of eligibility and the government obligated itself to pay a fixed amount.

FIFRA Indemnity Claims Finalized In Fiscal Year 1988 and Prior Years

The 1988 continuing resolution prohibits EPA from using fiscal year 1988 appropriations for FIFRA indemnity payments and the committee reports on the continuing resolution

^{8/} Rather than following an established procedure, it appears that the EPA Administrator in some instances has chosen to finalize these claims by means of ad hoc settlement agreements entered into with pesticide owners. See Background Report for the Indemnification Report to Congress, supra, at 35.

direct that indemnity payments be made from the Judgment Fund. Thus, any indemnity claim that EPA otherwise would obligate against and pay from fiscal year 1988 appropriations may be paid out of the Judgment Fund, regardless of when the pesticide registration was canceled or suspended.

Claims finalized in fiscal year 1988 may originate from events in prior years, but the government and the claimant did not come to terms on eligibility and payment issues until fiscal year 1988. Typically, these claims are characterized by the absence before fiscal year 1988 of a settlement agreement or judicial decree. However, even where pre-1988 agreements purporting to finalize claims are found, it is important to look behind such formalities to see if the arrangements were tentative or final. If the settlement of the FIFRA claim was tentative before fiscal year 1988, and finalized in fiscal year 1988, then the liability for the claim will be a fiscal year 1988 obligation.

The Judgment Fund is available to pay compromise settlements and final judgments only where payment is "not otherwise provided for." 31 U.S.C. § 1304(a)(1). We had occasion to interpret that language in B-224653, Dec. 18, 1986. Congress had appropriated funds to the National Park Service to pay judgments on land it acquired through condemnation proceedings, but the appropriations had been exhausted. The question in B-224653 was whether the Judgment Fund could be used to pay the remainder of an outstanding condemnation judgment for the acquisition of land for the Congaree Swamp National Monument. We said:

"However, it was never the intent of the judgment appropriation to shift the source of funds for those types of judgments which could be paid from agency funds. To preserve the 'status quo' with respect to judgments which could be paid from agency funds, the judgment appropriations was made available only where payment was 'not otherwise provided for.' 31 U.S.C. § 1304(a)(1). If this were not the case, agencies would be in a position to avoid certain valid obligations by using the 'back door' of the judgment appropriations, and to this extent their budget requests would present to the Congress an artificially low picture of the true cost of their activities to the taxpayer.

"Payment is 'otherwise provided for' if some appropriation or fund under the control of the agency involved is legally available to pay the judgment in question. Thus, the application of

the 'otherwise provided for' concept turns on the question of legal availability of the appropriation rather than sufficiency of funds."
(Emphasis added.)

However, we also have decided that a congressional decision not to provide agency appropriations necessary to fund a statutory program, coupled with a final judgment in favor of a claimant, permits that claimant to tap the Judgment Fund for payment. We concluded in B-197747, August 1, 1986, that one of the prerequisites to reaching the Judgment Fund, namely that another source of funds is not "otherwise provided for," is met when Congress refuses to appropriate funds an agency needs to satisfy its legal liabilities and the agency does not have other funds at its disposal. We stated:

"In the event Congress fails to appropriate funds to satisfy obligations incurred under [Price-Anderson Act Indemnification Agreements], a cause of action would appear to exist against the United States by virtue of the contractual commitment. Under these circumstances, final judgments obtained against the United States would appear to be payable from the judgment appropriation. See B-168313, Nov. 21, 1969; 55 Comp. Gen. 768, 778 (1976)"

B-197742 at 6-1.

In other words, the mere fact that appropriated funds are inadequate to make an indemnity payment does not make the Judgment Fund available. Rather, we must examine the underlying reasons for the inadequate funds to ascertain whether Congress made a specific decision not to provide appropriated funds to satisfy the government's liability.

In the case before us, Congress intended to shield EPA's fiscal year 1988 appropriation from the expense of FIFRA indemnity claims. EPA testified in hearings on its 1988 budget that there was a shortfall of about \$5 million for taking actions already identified in fiscal year 1987 on chemicals previously suspended. Department of Housing and Urban Development-Independent Agencies Appropriations for 1988: Hearings Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations, 100th Cong., 1st Sess. 131 (1987) (statement of John Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA). The House Committee on Appropriations reported that indemnification claims for chemicals already suspended could exceed \$100 million, an amount exceeding the budget request

for the entire pesticide program. The committee further reported that it was prohibiting the use of funds appropriated to EPA for pesticide indemnification payments in anticipation of the authorizing committee addressing various issues affecting the indemnity payment program. H.R. Rep. No. 189 at 31. The conferees explicitly stated their expectation that claims which EPA deems valid be processed routinely by the Justice Department and paid promptly from the Judgment Fund. H.R. Rep. No. 498 at 852.

Whether funds are not otherwise provided for FIFRA indemnity payments and the Judgment Fund may be used for such payments is a matter to be decided on the facts and circumstances present in the congressional funding decisions relevant to the claims under consideration. With respect to claims finalized in fiscal year 1988, the continuing resolution and its legislative history reflect Congress' decision to prohibit EPA from paying these claims with appropriated funds normally available for such payments. Since this funding source is no longer legally available and Congress clearly intended that the Judgment Fund be used for FIFRA payments, we conclude that funds are not "otherwise provided for" making indemnity payments and that claims finalized in fiscal year 1988 may be paid from the Judgment Fund. With respect to claims finalized before fiscal year 1988, it is not clear whether such claims remain to be paid, and, even if there are, whether EPA plans to pay such claims from the Judgment Fund or from prior year funds in the surplus or merged surplus accounts. Determining the proper source for paying such prior year claims should be based on the facts and circumstances of a particular claim.

CONCLUSION

An indemnity claim is finalized for the purposes of recording an obligation against an appropriation when all questions regarding eligibility and compensation are resolved conclusively in favor of the claimant. Events such as the suspension or cancellation of a pesticide's registration do not create a "legal liability" (i.e., trigger a duty to record an obligation). A claim must be certain, not merely probable, before funds must be obligated for payment.

Certain events can take place in resolving a FIFRA indemnity claim that point to the date when it becomes finalized, and hence, becomes an obligation. A judicial decision on the merits of the claim finalizes a claim unless some issue is left unresolved by that decision. Settlement agreements entered into by EPA with a claimant also point towards the conclusion that a claim has been finalized. However, a dispute between the parties over the terms of a settlement

agreement would negate that conclusion. Finalization of a FIFRA indemnity claim is fact specific, and each situation must be examined in light of the general principles discussed in this memo to determine whether a claim has, in reality, been finalized.

The continuing resolution for fiscal year 1988, Pub. L. No. 100-202, prohibits the use of EPA's 1988 appropriation to make indemnity payments and the committee reports on the continuing resolution make clear Congress' intent that the Judgment Fund be used in lieu of fiscal year 1988 funds for FIFRA payments. Therefore, indemnity claims finalized during fiscal year 1988 may be paid from the Judgment Fund appropriation. The proper funding source for paying claims finalized before fiscal year 1988, if any such claims are outstanding, should be determined based on the facts and circumstances of the claims.

cc: Mr. Wolf, AFMD
Mr. Stoltz, AFMD
Mr. Grindstaff, AFMD
Mr. Reilly, AFMD
Ms. Efros, OGC
Mr. Centola, OGC
Ms. Green, GGD/Claims