UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

905R99102

REPLY TO THE ATTENTION OF C-14J

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RETURN RECEIPT REQUESTED

Mark D.Thompson, Esq.
Deputy General Counsel
Metropolitan Council
230 East Fifth Street
St. Paul, Minnesota 55101-1634

Re: Grant No. C270666-02
Audit Report No. P2CW4-05-0080-70110
Docket No. 05-99-AD03

Dear Mr. Thompson:

Enclosed is a copy of the Decision and Order of the Regional Administrator and the Report and Recommendation of the Resources Management Division, Water Division and Office of Regional Counsel in the above-referenced matter.

Please contact me at 312/886-4670 if you have any questions.

Sincerely yours,

Christine M. Liszewski
Associate Regional Counsel

Enclosures

bcc: R. Wisniewski, RMD
G. Wojcik, WD
M. Rickey, OIG
P. Klejwa, ORC
C. Stimson, ORC
T. De Grandchamp, OGC
ORC Library
Region 5 Library ✓

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN RE:	)	
	)	
METROPOLITAN WASTE CONTROL COMMISSION, ST. PAUL, MINNESOTA	)	**DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR PURSUANT TO 40 C.F.R. PART 30, SUBPART L**
	)	
Grant No. C270666-02	)	
Audit Report No.	)	
P2CW4-05-0080-70110	)	**DOCKET NO. 05-99-AD03**
	)	

DECISION AND ORDER

I have reviewed the attached Report and Recommendation of the Resources Management Division, Water Division and Office of Regional Counsel, and I concur and adopt its conclusions and recommendations. Therefore, the final determination of the Disputes Decision Official disallowing $193,980 in costs related to Change Order No. 2 and $44,040 in costs for engineering services is reversed. The Grantee has not reimbursed the United States for the federal share of the costs disallowed by the Disputes Decision Official and, as a result of this decision, owes no payment for these costs to the United States.

This Decision and Order constitutes final Agency action pursuant to 40 C.F.R. § 30.1225 (1986), unless the Grantee files a petition for discretionary review with the Assistant Administrator for Water, U.S. Environmental Protection Agency (4101), 401 M Street, S.W., Washington D.C. 20460, within 30 days of the decision. The petition should be sent by registered mail, return receipt requested, and must include:

a. a copy of the Decision and Order; and

b. a concise statement of the reasons why the Grantee believes the decision to be erroneous.

If such a petition is filed, a copy of the petition should be sent to: Comptroller Branch, Resources Management Division, MF-10J, U.S. Environmental Protection Agency, 77 W. Jackson Boulevard, Chicago, Illinois 60604-3590 and Office of Regional Counsel, C-14J, U.S. Environmental Protection Agency, 77 W. Jackson Boulevard, Chicago, Illinois 60604-3590.

Date: June 29, 1999

David A. Ullrich

Francis X. Lyons
Regional Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN RE:	)	
	)	
METROPOLITAN WASTE CONTROL	)	**REPORT AND RECOMMENDATION**
COMMISSION, ST. PAUL,	)	**OF THE RESOURCES MANAGEMENT**
MINNESOTA	)	**DIVISION, WATER DIVISION AND**
	)	**OFFICE OF REGIONAL COUNSEL**
Grant No. C270666-02	)	
Audit Report No.	)	
P2CW4-05-0080-70110	)	**DOCKET NO. 05-99-AD03**
	)	
	)	

DIGEST NOTES

GRL-040-038-000 Affirmative Management Decision

If the reviewing agency affirmatively considered and approved specific cost items during the administration of a grant, U.S. EPA will not subsequently disallow such costs, unless it determines that the previous approval was outside the limits of the reviewing agency's managerial discretion.

GRL-680-150-000 Estoppel

U.S. EPA is not estopped from recovering funds for costs found to be unallowable after an audit even though the costs were previously approved by a delegated State agency.

GRL-040-300-000 Documentation

A grantee has the obligation to present U.S. EPA with sufficient records to substantiate all of its claimed costs and to demonstrate that the costs are reasonable, necessary, eligible and otherwise allocable for Federal funding.

Costs claimed as architectural/engineering fees, though not supported by time sheets, may nevertheless be allowable if other records adequately support such costs and describe the nature of the services.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN RE:	)	
	)	
METROPOLITAN WASTE CONTROL COMMISSION, ST. PAUL, MINNESOTA	)	**REPORT AND RECOMMENDATION OF THE RESOURCES MANAGEMENT DIVISION, WATER DIVISION AND OFFICE OF REGIONAL COUNSEL**
	)	
Grant No. C270666-02	)	
Audit Report No. P2CW4-05-0080-70110	)	**DOCKET NO. 05-99-AD03**
	)	
REQUEST FOR REVIEW OF DISPUTE DECISION OFFICIAL'S FINAL DETERMINATION	)	
	)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

On April 30, 1987, the Disputes Decision Official ("DDO") in the United States Environmental Protection Agency ("U.S. EPA"), Region 5, issued a final determination that disallowed $238,020 of costs claimed by the Metropolitan Waste Control Commission ("MWCC") under the above-referenced grant.[1] On May 28, 1987, pursuant to 40 C.F.R. Part 30, Subpart L, MWCC requested review by the Regional Administrator of the DDO's disallowance of the entire amount of $238,020.[2]

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[1] In a November 30, 1998 memorandum provided by the Metropolitan Council in St. Paul, Minnesota in support of reinstating the costs disallowed by the DDO, counsel for the Metropolitan Council states that MWCC was abolished by the Minnesota Legislature effective July 1, 1994. Nov. 30, 1998 memo from Metro at 2. The Metropolitan Council is now the successor entity with respect to MWCC's interests and obligations.

[2] Substantive issues related to this grant are governed by the regulations in effect at the time the grant was awarded, whereas the procedural aspects of this dispute are governed by the regulations in effect when MWCC submitted its request for review of the DDO's final determination. City of Bloomington, Indiana, 05-88-AD03 at 12 (Decision of the Assistant

II. BACKGROUND

U.S. EPA awarded Grant No. C270666-02 to MWCC on November 28, 1975. The grant provided $3,140,577 ($2,355,433 in federal funds) for the construction of two aeration compressor units and associated equipment at the Metropolitan Wastewater Treatment Plant. The project period for this grant expired on January 19, 1983.

On behalf of the Office of Inspector General ("OIG"), Foxx & Company conducted an audit of the grant, and OIG issued a final audit report on October 21, 1986. The final audit report questioned $193,980 ($145,485 in federal funds) and set aside $44,040 ($33,030 in federal funds).[3] The questioned costs include storage, insurance and additional costs incurred because the Compressor Building Addition in which the aeration compressor units were to be installed was not completed when the compressor equipment was ready for installation. The set-aside costs include costs for engineering services performed between April 1, 1979 and May 31, 1981, when the compressor equipment was in storage.

According to the audit report, the original contract specified installation of the compressor equipment by September 15, 1979. Change Order No. 1 extended the installation date of the equipment to February 2, 1980 at no additional cost. Change Order No. 2 extended the completion date for installation to October 31, 1981 at a cost of $319,022. The Minnesota Pollution Control Agency ("MPCA") determined that $193,980 of the total cost was eligible for grant funding and endorsed a funding increase in that amount. U.S. EPA awarded Grant Amendment No. 2 in the amount of $145,485 (federal share) on September 24, 1980.

A. Draft Audit Report

Foxx sent a draft audit report to MWCC for comments on July 10, 1986. Foxx questioned $193,980 in storage, insurance and other costs for the compressor equipment. In addition, the

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Administrator; August 5, 1991). Grant No. C270666-02 was awarded on November 28, 1975. Thus, the controlling regulations for substantive issues are the general grant regulations at 40 C.F.R. Part 30 (May 8, 1975) and the construction grant regulations at 40 C.F.R. Part 35 (February 11, 1974). The controlling regulations for procedural issues are the general grant regulations at 40 C.F.R. Part 30, Subpart L (September 30, 1983).

[3] The audit report defines "costs questioned" as "claimed costs that should not be reimbursed by the Government because the costs are not allowable under the provisions of the applicable laws, regulations, policies, cost principles, or terms of the grants." The audit report defines "costs set-aside" as "claimed costs that have not been questioned, but cannot be accepted without additional information or evaluation and approval by EPA officials or their representatives."

auditors questioned $8,672 and set aside $39,490 in costs incurred for engineering services during the period of time when the compressor equipment was in storage. The invoices prepared by MWCC's engineering consultants state that the services they performed were "GENERAL SUPERVISION OF CONSTRUCTION." The draft audit report had questioned what general supervision was performed while the compressor equipment was in storage since the manufacture and installation of this equipment were the primary tasks under the grant.

MWCC provided comments on the draft report to Foxx on August 21, 1986. Regarding the $193,980 in questioned costs, MWCC stated that these costs were incurred due to the delay in the construction of the Compressor Building Addition. The Compressor Building Addition and the Sludge Processing Building are located in close proximity to each other, and MWCC did not believe that it could construct the Compressor Building Addition and the Sludge Processing Building at the same time. Due to the threat of federal and state penalties as a result of air and water quality standards violations, MWCC decided to construct the Sludge Processing Building first. At the time, MWCC believed that it could, nonetheless, also complete the Compressor Building Addition before the air compressor units were ready for installation.

Delays in the construction of the Sludge Processing Building and the availability of grant funds delayed MWCC's submittal of a grant application for the Compressor Building Addition and its subsequent construction. MWCC stated that the "rules" in force at the time these projects were under consideration did not require MWCC to pursue construction until federal grants were available. Finally, MWCC indicated that it believed the delays were caused by circumstances beyond its control and thus the cost to store the compressors was justified.

Regarding the engineering costs, MWCC indicated, among other things, that it, and not its engineering consultants, was responsible for supervision of construction. Toltz, King, Duvall, Anderson and Associates, Inc. ("TKDA"), MWCC's engineering consultants, performed tests of the compressors, reviewed shop drawings, and coordinated activities during the period when the compressors were in storage. MWCC provided a packet of letters that refer to the activities performed by TKDA during this time period.

B. Final Audit Report

On October 21, 1986, OIG issued the final audit report. The final audit report included a summary of MWCC's comments on the draft audit report. Regarding the $193,980 in questioned costs, the auditors determined that these costs are not allowable under the regulations at 40 C.F.R. §§ 35.903(m) and 30.705(a).[4] Accordingly, the auditors concluded that it does not

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[4] Section 35.903(m) provides that "[t]he approval of a plan of study for Step 1, a facilities plan, or award of grant assistance for Step 1, Step 2, or Step 3, or any segment thereof, will not constitute a Federal commitment for approval of grant assistance for any subsequent project."

appear reasonable to fund a change order resulting from MWCC's inability to submit a grant application or initiate construction in a timely manner and that MWCC had a commitment to complete the project with or without additional Federal assistance.

Regarding the costs associated with technical services, the final audit report set aside $44,040.[5] The auditors concluded that many of the activities performed by MWCC's engineering consultants during the time the equipment was in storage may be eligible for funding. However, the auditors also indicated that activities related to the storage of the compressor equipment should be considered ineligible if the entire amount of Change Order No. 2 is determined to be ineligible. Finally, the auditors recommended that a technical evaluation of these engineering activities be performed to determine if they were eligible and valued at the $44,040 incurred by MWCC's consultants.

On October 30, 1986, Region 5 provided MWCC with the final audit report and requested that MWCC either pay the Federal share of the questioned and set-aside costs or request a final determination and provide specific reasons and documentation indicating why the audit findings were in error. On November 24, 1986, MWCC provided a written response indicating that it disagreed with the findings in the audit report.

Regarding the questioned costs, MWCC raised the following issues: 1) Section 101(a)(4) of the Federal Water Pollution Control Act Amendments of 1972 proclaims that it is the national policy that Federal financial assistance be provided to construct publicly-owned waste treatment works and, in 1973, MPCA approved a policy to defer construction of publicly-owned treatment works in cases where a construction grant was not available; 2) the 1977 Clean Water Act added Subsection 301(i)(1) which provides for extensions for compliance with limitations where construction is required to achieve limitations but construction cannot be completed within the time required or the United States has failed to make financial assistance available in time to achieve such limitations; 3) MWCC aggressively undertook improvements to its wastewater treatment facilities, with or without grant funds, and 31 major construction contracts were authorized at the MWCC plant at a cost of $356.2 million; 4) because it was necessary to construct projects concurrently and the MWCC plant is totally enclosed by a flood protection dike, many physical constraints were placed on building activities at the site; and 5) Change Order No. 2 was approved by U.S. EPA as a grant amendment.

Regarding the set-aside costs, MWCC stated that the scope of work under the compressor grant included ancillary construction activities which required engineering services independent of the

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Section 30.705(a) provides that "[t]he costs must be reasonable and within the scope of the project;"

[5] This amount is different than the amount in the draft audit report. However, the actual amount is not at issue in this grant dispute.

manufacture of equipment and that the acceptance of these services should not be tied to Change Order No. 2. MWCC referenced the engineering documents it provided to Foxx on August 21, 1986 in support of its position.

C. Preliminary Determination

The DDO issued a preliminary determination on March 17, 1986 in which he requested additional documentation from MWCC regarding the questioned and set-aside costs and stated that these costs would be disallowed if MWCC did not provide the required documentation. Regarding the questioned costs, the DDO disagreed with MWCC's interpretation of the 1977 Clean Water Act and stated that MWCC did not demonstrate that the cost of Change Order No. 2 was reasonable and allocable to the grant. The DDO requested the following additional documentation: 1) a written history of the change order negotiations supported by the documents utilized to arrive at change order scope and price; 2) a demonstration that the delay which caused the increased costs was not caused by and could not have been mitigated by MWCC or its agents or contractors; 3) a demonstration that the costs associated with the delays are directly allocable to the subject grant; 4) a cost/price analysis that demonstrates the reasonableness of the change order costs; and 5) any other documentary evidence relating to the allowability of the costs.

Regarding the set-aside costs, the DDO stated that the material submitted by MWCC did not identify the type of engineering services performed by TKDA or the amount charged to the project. The DDO requested source documentation, such as time sheets or daily logs, which clearly identified all engineering services which pertain to the set-aside costs and support the amount of set-aside costs.

On April 17, 1987, MWCC responded to the DDO's preliminary determination letter. In its response, MWCC referred to its previous correspondence on the issues raised in the audit report. In addition, MWCC provided copies of TKDA billings to support the set-aside costs and all of its file materials on Change Order No. 2.

D. Final Determination

On April 30, 1987, the DDO issued its final determination upholding the audit findings and disallowing $193,980 in questioned costs and $44,040 in set-aside costs. Regarding the questioned costs, the DDO found that MWCC had not provided a cost/price analysis which demonstrated that the costs were reasonable, a demonstration that the costs associated with the delays were directly related to the subject grant, and a demonstration that the delays were not caused by MWCC or its contractors.

Regarding the set-aside costs, the DDO stated that the TKDA invoices provided by MWCC indicate that the work performed by TKDA was for general supervision of construction. The invoices did not provide any reference to the engineering services that MWCC stated in earlier

correspondence were provided by TKDA while the compressor units were in storage, i.e., tests of the compressors, review of shop drawings and coordination of activities. Since MWCC provided no source documents which clearly identify these activities, the DDO disallowed the set-aside costs.

E. Appeal

Pursuant to 40 C.F.R. Part 30, Subpart L, MWCC requested a review of the DDO's final determination by the Regional Administrator in a May 28, 1987 letter. Regarding the questioned costs, MWCC raised the following issues: 1) the regulations and policies in effect on the date of the grant award are not being applied to this grant because of references to the 1977 Clean Water Act in the final determination; 2) the final determination fails to recognize the magnitude and complexity of construction activities at the MWCC plant during the time period in question; 3) the final determination ignores the basis of the grant approval of the delay costs associated with the compressor project; 4) the final determination disregards the explanations and documentation provided by MWCC in its November 24, 1986 letter; and 5) the delay costs associated with the compressor project fall within the "gray" areas addressed in EPA's Handbook of Procedures for the Municipal Wastewater Treatment Works Construction Grants Program and, unless the payment of these costs are expressly prohibited by federal regulation, disallowance of these costs contradicts the terms and conditions of the grant agreement.

MWCC raised the following issues regarding the set-aside costs: 1) MWCC's contract with TKDA did not authorize the supervision of construction work; 2) the audit report is inconsistent in its rationale regarding the eligibility of engineering costs since the auditors disallowed TKDA's services during the interval when the compressors were in storage but did not disallow TKDA's services during the period the compressors were being manufactured; and 3) there is a continued lack of understanding by U.S. EPA regarding the engineering services provided by TKDA since these costs are still being disputed in spite of the documents and explanations provided by MWCC. MWCC also provided copies of its contract with TKDA and a May 20, 1987 letter from TKDA defining the term "General Supervision of Construction" as applied to the compressor project.

On June 16, 1998, the Region sent a letter to the Metropolitan Council Environmental Services Division ("Metro") acknowledging receipt of the appeal and informing it of its rights under the regulations at 40 C.F.R. Part 30, Subpart L (1986). On November 30, 1998, Metro provided a memorandum and 29 exhibits in support of its position.[6] With respect to the questioned costs, Metro argues that: 1) the auditors had no reasonable basis for disallowing the costs of the change order; 2) the decision to approve Change Order No. 2 was an affirmative management decision

[6] Many of the exhibits Metro provided were duplicates of documents MWCC provided in response to the audit report and preliminary and final determinations. However, Metro did provide a number of new documents that were not previously part of the record for this dispute.

with a presumption of regularity; and 3) U.S. EPA is barred by equitable estoppel from disputing an approved change order. With respect to the set-aside costs, Metro argues that the course of correspondence in this matter presented MWCC with a moving target and an unending search for minutiae which were beyond the scope of the audit. Finally, with respect to both the questioned and set-aside costs, Metro argues that the Region's unreasonable delay in acting on MWCC's request for a review by the Regional Administrator has substantially prejudiced Metro in its ability to defend this matter and requested that the DDO's decision and any further proceedings in this matter be set aside on the basis of laches and the Administrative Procedure Act ("APA").

An informal conference was held in the Regional office on January 21, 1999. On February 17, 1999, Metro provided a post-conference memorandum and six supplemental exhibits.

III. ISSUES

A. Whether the DDO's disallowance of $193,980 in storage, insurance and other costs incurred because of delays in the construction of the Compressor Building Addition should be sustained.

B. Whether the DDO's disallowance of $44,040 in engineering costs incurred while the compressor equipment was in storage should be sustained.

IV. DISCUSSION

A. Costs Due to Delays in Construction of Compressor Building Addition

1. Reasonable Basis for Disallowing Costs of Change Order No. 2

In its November 30, 1998 memorandum, Metro argues that the auditors had no reasonable factual basis for disallowing the costs of Change Order No. 2. Nov. 30, 1998 memo from Metro at 5-8. The facts identified by Metro in support of its position are discussed under Affirmative Management Decision below.

2. Affirmative Management Decision

U.S. EPA has a long-standing policy of giving great weight to contemporaneous management decisions approving costs that are subsequently questioned in an audit. This policy was most recently articulated in a June 30, 1998 memorandum entitled "Review Standards for Construction Grants Audits, Management Decisions, and Dispute Resolution"("June 1998 Guidance"). The June 1998 Guidance states that

> [p]revious EPA and state eligibility determinations should be reversed in the audit and dispute resolution processes only when those determinations misapplied or disregarded applicable statutory or regulatory requirements. The contemporaneous decisions are entitled to a presumption of regularity

> and should not be questioned unless the record (or other information known to the Agency) provides evidence that statutory or regulatory requirements were misapplied or disregarded.

In a February 24, 1984 decision, U.S. EPA's Audits Resolution Board ("ARB") identified the following general principles for determining eligibility where an affirmative management decision has been made:

> 2.[7] Evidence of affirmative management decisions by EPA or a delegated State on the specific item questioned by audit should carry great weight in the decision whether to allow the relevant questioned costs.
>
> 3. Evidence of affirmative action is an insufficient basis on which to allow costs questioned by audit if the action was demonstrably:
>
> a. Outside the limits of managerial discretion, including actions that are arbitrary and unreasonable; and/or
> b. In violation of nondiscretionary standards in existence at the time of the administrative approval.

ARB Decision 13/14 (1984).

In applying these general principles, U.S. EPA has consistently held that if the reviewing agency affirmatively considered and approved specific cost items during the administration of a grant, U.S. EPA will not subsequently disallow such costs, unless it determines that the previous approval was outside the limits of the reviewing agency's managerial discretion. City of Galion, Ohio, AA-94-AD01 at 3 (November 22, 1996); City of Oxnard, California, AA-90-AD16 at 3-4 (April 4, 1996); City of Bloomington, Indiana, 05-88-AD03 at 7 (Decision of the Assistant Administrator; August 5, 1991); Jeanerette, Louisiana, 06-87-AD03 at 4 (December 18, 1987); Holdenville, Oklahoma, 06-86-AD02 at 8-9 (December 18, 1986).[8]

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[7] Item No. 1 in ARB Decision 13/14 does not articulate a principle for assessing an affirmative management decision and thus is not quoted here.

[8] In its November 30, 1998 memorandum, Metro refers to the October 1, 1990 memorandum from James A. Hanlon, Director, Municipal Construction Division, and Kenneth A. Konz, Assistant Inspector General for Audit, entitled "Costs Incurred After Contract Completion Date" and the "hard look" concept that was initially articulated in this memorandum and subsequently characterized in Northeast Ohio Regional Sewer District, Ohio, AA-90-AD14 (June 11, 1994). While it appears that the elements of a "hard look" articulated in Northeast Ohio would be useful in evaluating any contemporaneous eligibility determination, since the October 1, 1990 memorandum indicates that it is intended to address disputes involving the

The principles articulated in the ARB 13/14 Decision provide that evidence of an affirmative management decision on the specific item questioned by the audit should carry great weight in the decision whether to allow the questioned costs. In its November 30, 1998 memorandum, Metro outlined the chronology and substance of MWCC's discussions with MPCA regarding Change Order No. 2.[9] Nov. 30, 1998 memo from Metro at 11-12. In addition, Metro provided copies of internal MWCC memorandums and correspondence between MWCC and MPCA regarding Change Order No. 2. Exhibits 6, 7, 8, 10, 11, and 12.[10]

The documents provided by Metro indicate that MPCA had at least two phone conferences or meetings with MWCC staff to discuss the change order and that MPCA expressed concerns regarding several of the items in the change order. See February 6, 1980 memorandum from Ron Bunton to Don Overland (Exhibit 7) and February 13, 1980 memorandum from Don Overland to Ron Bunton (Exhibit 8).

First, MPCA requested a more detailed explanation from MWCC regarding the decision to store the compressors in Duluth instead of in the Twin Cities. Second, MPCA disallowed proposed interest costs for the value of equipment not delivered and interest on the retainage. Third, MPCA questioned the subcontractor's charge for inflation. Fourth, MPCA sought direction from U.S. EPA regarding whether the 75 percent payment limitation for specially manufactured equipment could be waived. Id. Thus, the evidence indicates that MPCA specifically considered Change Order No. 2 and made an affirmative management decision to approve it. MPCA's decision is entitled to a presumption of regularity unless the action was demonstrably in violation of nondiscretionary standards in existence at the time of the approval or outside the limits of managerial discretion.

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allowability of post-scheduled contract completion architecture/engineering fees and the costs at issue in Change Order No. 2 are not engineering fees, the elements of a "hard look" articulated in Northeast Ohio will not be addressed in this report.

[9] In its November 30, 1998 memorandum, Metro stated that in order to reconstruct MPCA's review of Change Order No. 2 it requested access to MPCA's files on this grant but MPCA has been unable to locate its files. Nov. 30, 1998 memo from Metro at 11. In a December 3, 1998 letter, the Office of Regional Counsel also requested copies of MPCA's files. In a March 5, 1999 response, MPCA informed the Region that it has been unable to locate these files, has requested the State Attorney General's Office to search their files for pertinent information, and stands by its decision and approval of this change order. Since no MPCA files have been located, a review of whether MPCA made an affirmative management decision in approving Change Order No. 2 is limited to the documents provided by Metro from its files.

[10] The exhibits cited in this report refer to the exhibits to the November 30, 1998 and February 17, 1999 memorandums submitted by Metro.

In the instant case, the auditors determined that the storage, insurance and additional costs associated with the delay in installation of the compressors were not allowable under the regulations at 40 C.F.R. §§ 35.903(m) and 30.705(a). In addition, the DDO determined that MWCC did not provide a cost/price analysis which demonstrated the reasonableness of the costs and a demonstration that the costs were directly allocable to the subject grant.

Section 35.903(m) provides that the approval of a plan of study for Step 1, a facilities plan, or award of grant assistance for Step 1, Step 2, or Step 3, or any segment thereof, will not constitute a Federal commitment for approval of grant assistance for any subsequent project. The auditors stated that as a result of MWCC's inability to submit a timely grant application for construction of the Compressor Building Addition, MWCC incurred ineligible costs for storage and insurance of the compressor equipment. In its November 30, 1998 memorandum, Metro argues that Section 903(m) is irrelevant since MWCC has never argued that by awarding a grant for the compressors, there was a Federal commitment for grant assistance for the Compressor Building Addition. Nov. 30, 1998 memo from Metro at 6. Since Section 35.903(m) does not include a specific requirement that a grantee must meet or a prohibition that a grantee cannot contravene, we conclude that MPCA's approval of Change Order No. 2 was not contrary to Section 35.903(m).

Section 30.705(a) provides that the costs must be reasonable and within the scope of the project to be allowable. The auditors stated that it does not appear reasonable to fund a change order resulting from MWCC's inability to submit a grant application or initiate construction of the Compressor Building Addition in a timely manner. Metro argues that the auditors attempted to convert a financial standard of reasonableness into a judgment as to the reasonableness of construction staging. Nov. 30, 1998 memo from Metro at 6. Metro further states that "[i]t was inappropriate, unreasonable, and beyond their expertise for the auditors to make what was basically an engineering conclusion based on their limited knowledge of the situation." Id. at 8. In support of its position, Metro cites the magnitude and complexity of the construction activities at the Metro Plant during the time period in question. Between 1970 and 1985, MWCC undertook 31 major construction contracts at the Metro Plant at a cost of $356.2 million. Many physical constraints were placed on building activities due to the need to construct projects concurrently and because the plant is totally enclosed by a flood protection dike. Metro also stated that U.S. EPA recognized the complexity of the construction activities at the plant by providing grant funding for a consultant hired by MWCC to coordinate these projects.

Prior dispute decisions provide insight into what standard should be used in assessing the reasonableness of contract costs claimed by grantees:

> Although most Federal procurement requirements do not apply directly to grantee procurement, they serve as a standard against which the reasonableness of grantee procurement actions can be measured." Bloomington, Indiana, 05-88-AD03 (September 23, 1988; Assistant Administrator decision issued August 5, 1991). The Federal

> Procurement Regulation at 41 CFR 1-15.201-3 (July 24, 1964) states that "a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." EPA has consistently applied this standard in assessing the reasonableness of contract costs claimed by grantees. (citations omitted)

City of Oxnard at 6.

In the instant case, it appears that the auditors were concerned about the nature of the costs. Based upon the provisions of the Federal procurement regulation, the nature of the cost is a valid consideration in determining whether a cost is reasonable. However, taking into account the magnitude and complexity of the construction activities at the Metro Plant during the time period in question, we find that MPCA's approval of these costs was not contrary to 40 C.F.R. § 30.705(a).

In the final determination, the DDO found that MWCC did not provide a cost/price analysis which demonstrated the reasonableness of the costs and a demonstration that the costs were directly allocable to the subject grant. In its November 30, 1998 memorandum, Metro argues that these two issues are not relevant because they were not raised in the audit report. Metro's Nov. 30, 1998 Memo at 5.

Section 30.820(b) of the general grant regulations provides that "[a] final audit shall be conducted after the submission of or the due date of the final financial status report...." 40 C.F.R. § 30.820(b)(1975). The regulations include no provisions that limit the scope of the audit to the issues identified in the audit report issued by OIG. The issues raised by the DDO in the preliminary and final determinations regarding a price/cost analysis and allocation of project costs were identified by the Water Division and are properly considered within the scope of the audit. Moreover, even if these issues were not considered as part of the audit, as the individual designated to resolve assistance disputes pursuant to 40 C.F.R. § 30.1200 (1986), the DDO can request whatever additional information and/or documentation he considers necessary to resolve the dispute.

Regarding the issue of a price/cost analysis, the final determination does not specify which regulatory provision was of concern. Metro argues that the requirements for a cost/price analysis are found at 40 C.F.R. § 33.510-3(a)(2)(1979) and that 40 C.F.R. § 33.001(1979) explicitly states that this provision does not apply to construction contracts under Grants for Construction of Treatment Works. Nov. 30, 1998 memo from Metro at 5. Metro is correct; this provision does not apply. However, an internal January 26, 1987 memorandum prepared by the Water Division states that the provisions of concern are found at 40 C.F.R. § 30.725.

Section 30.725-1 of the general grant regulations states that "[t]he reasonableness of the price or cost of each grant application or negotiated subagreement proposal must be considered. The

method and degree of analysis shall depend on the circumstances of the particular grant or subagreement action." 40 C.F.R. § 30.725-1. Sections 30.725-4(a) and (b) provide, respectively, that a formal cost analysis shall be made and a summary of findings prepared for all research, demonstration, planning and training grant applications deemed relevant and requesting U.S. EPA funds in excess of $100,000 and for all grant applications from profit making organizations deemed relevant. 40 C.F.R. §§ 30.725-4(a) and (b). Section 30.725-4(c) provides that "[a]ny other grant application or subagreement may receive a cost analysis where EPA's program office or grants administration office considers it appropriate." 40 C.F.R. § 30.725-4(c).

Pursuant to Section 30.725-4(c), if U.S. EPA considered a cost analysis appropriate, MWCC may have been required to provide one. Metro did not address the applicability of Section 30.725 in its November 30, 1998 memorandum. However, a discussion of this section was included during the informal conference on January 21, 1999. In its post-conference memorandum, Metro stated that it does not believe that this section is applicable or relevant in the instant case. Feb. 17, 1999 memo from Metro at 3. However, Metro did include an affidavit from Rich Rovang, the Assistant Director of Construction in the Wastewater Services Department, in which he stated that he reviewed Metro's records related to Change Order No. 2 and found no documents indicating that U.S. EPA or MPCA requested a cost/price analysis. Feb. 17, 1999 Affidavit of Rich Rovang (Exhibit 30). Based on Mr. Rovang's affidavit, it appears that U.S. EPA did not request a cost/price analysis for Change Order No. 2. Thus, MPCA's approval of Change Order No. 2 without a cost/price analysis was not contrary to Section 30.725-4(c).

Regarding the allocability issue raised by the DDO, Section 30.705 of the general grant regulations provides that

> Allowability of project costs shall be determined by the following:
> (a) The costs must be reasonable and within the scope of the project;
> (b) The cost is allocable to the extent of benefit properly attributable to the project;
> (c) Such costs must be accorded consistent treatment through application of generally accepted accounting principles;
> (d) The cost must not be allocable to or included as a cost of any other federally assisted program in any accounting period (either current or prior)....

40 C.F.R. § 30.705(1975).

Even though Metro indicated in its November 30, 1998 memorandum that the allocability issue is not relevant to the grant dispute since it was not raised in the audit report, Metro did provide copies of correspondence from the prime contractor and each subcontractor describing in detail the basis for the costs to be incurred. See Exhibit 10. The information provided shows that all

costs are directly related to the compressor equipment. Thus, MPCA's approval of these costs was not contrary to the allocability provisions at 40 C.F.R. § 30.705.

The final issue to be considered is whether MPCA's decision to approve Change Order No. 2 was demonstrably outside the limits of its managerial discretion, including actions that were arbitrary and unreasonable. In all of its correspondence related to this grant dispute, MWCC and Metro have argued that the delay in the construction of the Compressor Building Addition was the result of delays in the construction of the Sludge Processing Building which were beyond MWCC's control. None of MWCC or Metro's correspondence includes an explanation of what factors caused the delays in the construction of the Sludge Processing Building.

In support of its position that the need to incur storage and insurance costs for the compressor equipment was not due to MWCC's mismanagement, Metro argues that the U.S. Army Corps of Engineers ("Corps"), U.S. EPA's agent at the site, did not express any concerns about MWCC's management of the compressor project. Metro's argument that the Corps failed to make any observations of mismanagement of the project appears to misrepresent the role of the Corps. The Corps was not responsible for "supervising the grantee's construction management" as stated by Metro. Nov. 30, 1998 memo from Metro at 7.

Pursuant to the Interagency Agreement between the Corps and U.S. EPA, the Corps was, among other things, responsible for ensuring that Step 3 grant projects were "constructed in accordance with high standards of construction practice and in accordance with applicable Federal requirements to meet the environmental objectives of the Title II Construction Grant Program." See Appendix C to the Interagency Agreement between the U.S. Army Corps of Engineers and U.S. EPA at C-1(Exhibit 4). With regard to the Corps' role in reviewing and approving change orders, Appendix A to the Interagency Agreement specifically excludes this responsibility from the Corps' scope of work. See Appendix A at A-6 (Exhibit 4). In addition, Appendix C to the Interagency Agreement specifies that the Corps will review and certify change orders, if this task was not delegated to the State. See Appendix C at C-4 (Exhibit 4). Since U.S. EPA delegated this task to MPCA, the Corps had no responsibility for reviewing and approving Change Order No. 2.

In May 1983, the St. Paul Pioneer Press published a series of articles entitled "Empire of Waste" that made serious allegations of mismanagement of the construction of the Metro Plant by MWCC. One of the articles specifically dealt with the construction of the Sludge Processing Building and alleged design flaws, lawsuits, equipment failures, and cost overruns exceeding $25 million. As a result of these allegations, OIG conducted an investigation of MWCC's management practices and audits of all construction grant projects at the Metro Plant. The Office of Regional Counsel recently requested copies of the investigative report and the audit report for the Sludge Processing Building. Apparently they no longer exist.

Since MPCA has been unable to locate its files on this grant, we do not know whether MPCA considered the reasons for the delays in the construction of the Sludge Processing Building when

it made its decision to approve Change Order No. 2. Furthermore, we do not know whether MPCA was aware of and, if so, investigated any allegations of MWCC's mismanagement that may have contributed to delays in the construction of the Sludge Processing Building or the Compressor Building Addition. Without any substantive evidence to conclude that the delays were due to mismanagement by MWCC or that MPCA was aware of any mismanagement, MPCA's decision to approve Change Order No. 2 cannot be considered as outside the limits of its managerial discretion.

In sum, the evidence shows that MPCA affirmatively considered and approved specific cost items in Change Order No. 2. MPCA's approval of Change Order No. 2 was not contrary to the regulations at 40 C.F.R. §§ 35.903(m), 30.705 and 30.725. In addition, no evidence has been found that indicates that MPCA abused its managerial discretion in approving this change order. Thus, we conclude that MPCA's decision to approve Change Order No. 2 is entitled to a presumption of regularity and the DDO's decision to disallow $193,980 in storage, insurance and other costs associated with Change Order No. 2 should be reversed.

3. Equitable Estoppel

In its November 30, 1998 memorandum, Metro also argues that U.S. EPA is equitably estopped from questioning the costs in Change Order No. 2 since MPCA, as U.S. EPA's delegated agency, approved the change order and U.S. EPA approved a grant amendment providing funding for Change Order No. 2. Nov. 30, 1998 memo from Metro at 15-16. U.S. EPA's assistance dispute decisions do not support Metro's estoppel argument.

Assistance dispute decisions have consistently held that U.S. EPA is not estopped from recovering funds for costs found to be unallowable after an audit even though the costs were previously approved by a delegated State agency, the Corps of Engineers, or a U.S. EPA Regional office. City of Bloomington at 11; City of Baltimore, Maryland, 03-88-AD29 at 5 (June 28, 1991); Delavan Lake Sanitary District, Walworth County, Wisconsin, 05-89-AD10 at 16-17 (June 8, 1990).

These decisions are based on a long-held Supreme Court precedent refusing to apply the doctrine of equitable estoppel to the federal government on the same terms as to other litigants. Office of Personnel Management v. Richmond, 496 U.S. 414, 434 (1990) ("As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds."); Heckler v. Community Health Services, Inc., 467 U.S. 51, 63 (1984) ("[T]he general rule [is] that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.") (footnote omitted).

Consequently, the Region would not be estopped from recovering funds for the costs disallowed by the DDO in the instant case. However, if the Regional Administrator adopts our

recommendation to give deference to MPCA's approval of Change Order No. 2, estoppel will be a moot issue.

B. Engineering Costs During the Period When Compressor Equipment Was in Storage

In the final determination, the DDO disallowed $44,040 in set-aside costs for engineering services based on MWCC's failure to provide source documentation, such as time sheets or daily logs, which clearly identified the type of engineering services performed and all engineering services which pertained to the set-aside costs. The invoices prepared by MWCC's engineering consultants state that the services they performed were "GENERAL SUPERVISION OF CONSTRUCTION." The auditors had questioned what general supervision was performed while the compressor equipment was in storage since the manufacture and installation of this equipment were the primary tasks under the grant. In its November 30, 1998 memorandum, Metro stated that TKDA discarded the relevant time sheets and records. Nov. 30, 1998 memo from Metro at 21. See also Affidavit of David Kirkwold, TKDA (Exhibit 27). Metro did not indicate when or why TKDA discarded the time sheets.

The requirements governing the financial management systems and records that must be maintained by a grantee are found at 40 C.F.R. §§ 30.800 and 30.805 (1975). Section 30.800 states that the grantee is responsible for maintaining a financial management system which shall adequately provide for, among other things, accounting records "which are supported by source documentation." Section 30.805(a) states that

> The grantee shall maintain books, records, documents, and other evidence and accounting procedures and practices sufficient to reflect properly . . . the total costs of the project, including all direct and indirect costs of whatever nature incurred for the performance of the project. . . . In addition, contractors of grantees, including contractors for professional services, shall also maintain books, documents, papers and records which are pertinent to a specific EPA grant award.

40 C.F.R. § 30.805(a).

In addition, Section 30.805(c) requires the grantee and its contractors to retain its records until any appeals related to assistance disputes have been finally resolved.

Pursuant to 40 C.F.R. § 30.710(a), the cost principles for determining allowable costs for all grants and subagreement awarded to state and local governments are provided in Federal Management Circular 74-4.[11] With regard to compensation for personal services, these cost

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[11] The Office of Management and Budget ("OMB") reissued Federal Management Circular 74-4, dated July 18, 1974, on January 28, 1981 as OMB Circular No. A-87. No

principles indicate that "[p]ayrolls must be supported by time and attendance or equivalent records for individual employees." OMB Circular A-87, § B(10)(b).

Equivalent records have been defined as "records with indicia of reliability equivalent to contemporaneous records made with input from the employee which show the number of hours each employee worked on eligible projects." City of Canton, Ohio, 05-90-AD-09 at 12 (September 23, 1991). Most importantly, the documentation should tie the claimed payroll charges to activities eligible for reimbursement.

Costs which a grantee cannot properly support pursuant to 40 C.F.R. § 30.800 and 30.805 are not allowable. ARB Decision 8 (1981). While recognizing the primary importance of time sheets and payroll records, the Region has, nevertheless, accepted substitute documentation that is both substantial and significant. City of Eaton Rapids, Michigan, 05-86-AD17 at 6-7 (July 28, 1987). Several types of substitute documentation have been found to be acceptable. Mechanized accounting records supporting costs on invoices were sufficient to find costs necessary and reasonable. City of Eaton Rapids at 7. Affidavits, when considered in conjunction with invoices and other documentation, constituted adequate documentation. Gary Sanitary District, 05-92-AD12 at 18 (January 12, 1996). On the other hand, "invoices [that] merely state in a cursory manner the type of work provided .... do not provide information from which it can be determined that the work was necessary to the scope of the project." Western Calhoun County Sewer Project, #2 Pennfield Township, Calhoun County, Michigan, 05-86-AD17 at 5 (May 21, 1987).

In its explanation of why MWCC did not provide time sheets or daily logs in response to the DDO's request, Metro stated: First, the DDO's request for source documentation was not properly under consideration because the auditors did not raise this as an issue. Nov. 30, 1998 memo from Metro at 20. Second, Metro questioned whether it was "seriously suggested" that "MWCC should have used its resources to go through two years of 'time sheets and daily logs', identify those that are relevant, and copy those records; or that Region V would use its resources to actually review all those records?" Id. at 21. Finally, Metro indicated that it was MWCC's understanding that the auditors completed an on-site review of TKDA's records and that all source documentation was found to be satisfactory and that any questions regarding TKDA's costs should have been raised at that time.

The reasons provided by Metro are without merit. Regarding whether the DDO's request for source documentation was proper, as discussed under Affirmative Management Decision above, the DDO can request whatever information he considers necessary to resolve the dispute. Regarding the expenditure of resources to compile the relevant time sheets, a grantee has the obligation to present U.S. EPA with sufficient records to substantiate all of its claimed costs and to demonstrate that the costs are reasonable, necessary, eligible and otherwise allocable for

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substantive changes were made in the Circular. 46 Fed. Reg. 9548 (January 28, 1981).

Federal funding. City of Canton at 13; Delavan Lake Sanitary District at 21. MWCC's obligation included providing the time sheets or daily logs requested by the DDO. By not compiling these records, MWCC put itself in jeopardy of losing $33,030 in federal grant funds.[12] Finally, no regulatory provision or case law limits MWCC's obligation to answer only those questions raised by the auditors during the on-site review of the contractors records.

In addition, Metro argues that to require "the minutiae suggested in the Final Determination in order to find the set-aside engineering costs allowable would inappropriately disallow legitimate grant costs." Nov. 30, 1998 memo from Metro at 24. In support of its position, Metro claims that in Russian River, Sonoma County, California, Docket No. 82-48 (Board of Assistance Appeals Decision, 8/10/83) the Board of Assistance Appeals reversed a region when it sought documentation in excessive detail. In Russian River, the Board reversed a regional decision disallowing direct costs even though the record included daily time sheets and copies of employees' field notes. It is unclear how this case supports Metro's position since Metro never provided the DDO with the time sheets or daily logs he requested.

Even though MWCC and Metro did not provide the source documentation requested by the DDO, MWCC and Metro submitted a substantial amount of other documentation regarding the engineering services at issue throughout the course of this dispute.[13] Among other things, these documents include :

1) MWCC's engineering contract with TKDA which did not authorize supervision of construction work (Exhibit 1);

2) a May 20, 1987 letter from TKDA explaining what it meant by the term "GENERAL SUPERVISION OF CONSTRUCTION" (Exhibit 25);

3) thirty serial letters reflecting the various services performed by TKDA while the compressor equipment was in storage (Exhibits 19 and 32);

4) sixty-seven shop drawings reviewed by TKDA during the time period in question (Exhibits 20 and 32);

5) monthly invoices from May 1979 through June 1981 which include, among other things, the names of all employees providing services related to the project, the days on which services were provided and the number of hours each day, and the hourly rate of each employee (Exhibit 24);

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[12] This amount represents the federal share of the disallowed $44,040.

[13] As an exhibit to its post-conference memorandum, Metro did provide source documentation for one former TKDA employee who worked on the compressor project.

6) an affidavit from David Kirkwold, Environmental Department Manager at TKDA, regarding the normal practice used by TKDA in accounting for engineering costs during the period in question (Exhibit 27);

7) an analysis which correlates the documents submitted as evidence of engineering services with the invoices submitted by TKDA (Exhibit 34);

8) an affidavit from Burnell Hanson, an engineer who worked for TKDA during the time period in question and performed engineering services on the compressor project (Exhibit 35); and

9) Burnell Hanson's personal time records for the months for which TKDA requested payment for the engineering services he performed (Exhibit 36).

In addition to providing a substantial amount of documentation regarding the engineering services at issue, the documentation provided by MWCC and Metro is significant. In particular, the serial letters prepared by TKDA during the time period in question provide a good indication that the type of engineering services performed by TKDA included acceptance testing of the compressors, review of shop drawings, coordination of activities and review of the operating manual. In addition, the shop drawings provide the date of transmittal and, on some drawings, a notation by the reviewer of the exact date on which the review was completed.

Corroborating this evidence are an affidavit from Burnell Hanson, a former TKDA employee who performed engineering services on the compressor project, and copies of his personal time records. On his time sheets, Mr. Hanson noted the dates on which he worked on the project, the number of hours each day, and a description of his work activities. Based on the description of his work activities, Mr. Hanson spent a considerable amount of the time he charged to the compressor project reviewing shop drawings and spent no time on supervision of construction. A comparison of Mr. Hanson's time sheets with the invoices submitted by TKDA shows that TKDA's monthly invoices accurately reflect the information on his time sheets. Finally, in his affidavit, Mr. Hanson stated that, to the best of his knowledge and belief, the other persons whose names appear on TKDA's invoices carried out design activities on the compressor project, that they were required to maintain daily time records in substantially the same form as those attached to his affidavit, and that TKDA transferred the hours from those time sheets to its monthly invoices.

In the final audit report, the auditors stated that a technical review of the engineering activities performed by TKDA should be performed to determine whether these activities were eligible for reimbursement. The auditors also stated that some of the activities related to the storage of the compressor equipment and, if the entire amount of Change Order No. 2 was determined to be ineligible, these activities should also be considered ineligible. In its November 30, 1998 memorandum, Metro argues that the engineering services at issue would have been required even in the absence of Change Order No. 2. Nov. 30, 1998 memo from Metro at 19-20. The Water

Division has reviewed the documents submitted by MWCC and Metro and concluded that the engineering services performed by TKDA are eligible for reimbursement. The Water Division agrees with Metro that these services would have been required even in the absence of Change Order No. 2.

In sum, the documents provided by Metro identify the type of engineering services that TKDA performed and show that these services were not for general supervision of construction as stated on the invoices. Thus, we conclude that the DDO's decision disallowing $44,040 in set-aside costs for engineering services should be reversed.

C. Laches

In its November 30, 1998 memorandum, Metro argues that it has been substantially prejudiced by the Region's eleven-year delay in addressing its appeal and asks that the Region set aside the DDO's final determination and discontinue further proceedings on this matter on the basis of laches. Nov. 30, 1998 memo from Metro at 25. Metro points out several reasons why it has been prejudiced in its ability to defend this matter as a result of U.S. EPA's delay: 1) MPCA records that could demonstrate that MPCA's review of Change Order No. 2 constituted a "hard look" are no longer available; 2) the persons at MWCC that were most knowledgeable about Change Order No. 2 no longer work for Metro; 3) two key engineers on the compressor project no longer work for TKDA; and 4) the memories of all persons associated with Change Order No. 2 have faded as a result of the passage of eighteen years since the events at issue occurred.

The Supreme Court has long held that the United States is not bound by the defense of laches. Costello v. United States, 365 U.S. 265, 281 (1961); United States v. Summerlin, 310 U.S. 414, 416 (1940). In explaining the rationale behind this principle, the Supreme Court stated:

> The reason underlying the principle, said Mr. Justice Story, is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." United States v Hoar (CC Mass) 2 Mason 311, F Cas No 15373. This Court has consistently adhered to this principle. (citations omitted)

Costello at 281.

Based upon this precedent, at least two United States district courts have specifically rejected laches defenses against U.S. EPA. United States v. CPS Chemical Co., Inc., 779 F. Supp. 437, 451 (E.D. Ark. 1991) ("the EPA, as an agency of the United States, is exempt from the consequences of laches. Courts generally have refused to apply the doctrine of laches to the federal government when it is acting in its sovereign capacity to protect the public welfare." (citations omitted)); United States v. B.F. Goodrich Co., 609 F. Supp. 1, 5 (D.C. Ky. 1984) ("EPA, as an agency of the United States, is exempt from the consequences of laches." (citations omitted)).

In support of its position that laches is available as defense in the instant case, Metro cites the Board of Assistance Appeals decision in City of Anderson, Indiana, Docket No. 78-06 (Board of Assistance Appeals Decision, 12/21/82). Nov. 30, 1998 memo from Metro at 26. In City of Anderson, the Board of Assistance Appeals concluded that the facts supporting a finding that the Agency was guilty of laches did not exist. Metro argues that based on City of Anderson an assumption can be made that laches is available as a defense where a party can demonstrate a lack of diligence by U.S. EPA.

Regardless of any inferences that can be drawn from City of Anderson, an assumption that laches is available as a defense against U.S. EPA is in direct conflict with long-established Supreme Court precedent and two U.S. district court decisions to the contrary. In any event, if the Regional Administrator adopts our recommendation to reverse the DDO's decision, laches will be a moot issue.

D. Administrative Procedure Act

In addition to asking the Region to set aside the DDO's final determination and further proceedings in this matter on the basis of laches, Metro also cites Section 555(b) of the APA, 5 U.S.C. § 555(b), as a basis for its request. Nov. 30, 1998 memo from Metro at 25. Section 555(b) states that, among other things, "within a reasonable time, each agency shall proceed to conclude a matter presented to it." In a footnote, Metro also cites Section 555(e) which provides, among other things, that "[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding." Since the Regional Administrator has not yet issued a decision in response to MWCC's appeal, any issues related to "prompt notice" under Section 555(e) of the APA appear to be premature.

Metro cites two cases in support of its position. The first case, E.E.O.C. v. Westinghouse Elec.Corp., 592 F.2d 484 (8th Cir. 1979), is inapposite since the Eight Circuit clearly stated that its opinion was not based on the APA. Id. at 486. The second case, Panhandle Co-op.Ass'n, Bridgeport, Neb. v. E.P.A, 771 F.2d 1149 (8th Cir. 1985), dealt with a two and one-half year delay in issuing a final decision by the Chief Judicial Officer pursuant to an appeal of a decision assessing a $5,000 penalty for violations of the Federal Insecticide, Fungicide and Rodenticide Act by an administrative law judge. The court found that the proof was insufficient to demonstrate a violation of Section 555(b) and that before an agency action may be set aside for violation of Section 555(b) of the APA, "the aggrieved party must show that it was prejudiced by the delay." (citations omitted) Id. at 1153.

Section 555(b) of the APA clearly applies to an agency proceeding in which the underlying statute requires an opportunity for a hearing such as the proceeding in the Panhandle case. In contrast, the Clean Water Act does not provide a grantee with an opportunity for a formal hearing for the purpose of resolving an assistance dispute. The dispute resolution provisions for grants and other federal assistance in 40 C.F.R. § 30.1215 (1986) only provide that after a grantee files

a request for review of a DDO's decision, a grantee is entitled to be represented by counsel and submit documentary evidence and briefs for inclusion in a written record, an informal conference with U.S. EPA officials, and a written decision by the Regional Administrator.

Metro did not cite any cases that provide that section 555(b) applies to such a proceeding. We have conducted our own research into this issue and found only one case that assumes Section 555(b) applies to all forms of agency action. See Friends of the Bow v. Thompson, 124 F.3d 1210, 1220-21(10th Cir. 1997).

Assuming Section 555(b) applies to this assistance dispute, we are not convinced that Metro has been prejudiced by the Region's delay in processing its appeal. Pursuant to 40 C.F.R. § 30.805(g), MWCC/Metro and its contractors are required to retain their records until any appeals have been finally resolved. If Metro and TKDA retained their records as required by the regulations, Metro should have had any documentary evidence it elected to submit for inclusion in a written record. Unavailability of key employees and unreliability of memories would not matter if the records were retained as required by the regulations. Regardless, if the Regional Administrator adopts our recommendation to reverse the DDO's decision, the applicability of Section 555(b) of the APA and prejudice to Metro's defense due to the Region's delay in processing MWCC's appeal will be moot issues.

V. CONCLUSION

For the reasons set forth above, we recommend that the DDO's final determination disallowing $193,980 in costs related to Change Order No. 2 and $44,040 in costs for engineering services be reversed.

Respectfully submitted,

Date: June 18, 1999

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