UNITED STATES GOVERNMENT

Memorandum

B-207211

GENERAL ACCOUNTING OFFICE

July 9, 1982

TO : Assistant Regional Manager, Atlanta - Solon P. Darnell

THRU: Assistant General Counsel, OGC - Henry R. Wray

FROM : Senior Attorney, OGC - Gary L. Kepplinger

SUBJECT: Federal Funding of Local Share of Wastewater Treatment Construction Grants (File B-207211)

You recently asked us to determine whether grantees under Title II of the Federal Water Pollution Control Act (FWPCA), as amended, may finance all or a part of the grantee's share of eligible project costs from other Federal financial assistance programs. You question not only the use of other Federal grant funds to finance a grantee's share of eligible costs but also the use of direct Federal loans or Federally guaranteed or insured loans (hereafter collectively referred to as Federal loans) to finance such costs. Because of the general nature of your request, we have only provided a discussion of the generally applicable legal principles. We will be happy to work with your staff to resolve any questions relating to the application of these principles to a specific factual situation.

I.

Title II of the Federal Water Pollution Control Act, as amended, authorizes the Administrator, Environmental Protection Agency (EPA), to make grants to any State, municipality, or intermunicipal or interstate agency (grantee) for the construction of publicly owned treatment works (POTW). 33 U.S.C. §1281(g)(1). The primary purpose of the Federal grant assistance is to assist a grantee to satisfy the EPA enforceable discharge requirements of the FWPCA. 40 C.F.R. 35.901 (1981).

A prospective grantee must apply for grants to the Administrator, EPA, whose approval is conditioned by a number of statutory requirements. See 33 U.S.C. §1281(g), 1284. Thus, before approving a grant for any treatment works, the Administrator must determine that the grant applicant "agrees to pay the non-Federal costs of such works." 1/ 33 U.S.C. §1284(a)(4). Should

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1/ Although the Act requires the grantee to provide a specified share of eligible construction costs, the Act does not attempt to specify the sources or types of grantee contribution that may properly count towards the local match. [CONTINUED]

the Administrator so determine, the grant amount shall be 75 percent of the cost of construction, although for construction grants awarded after October 1, 1984, the Federal share shall be 55 percent. 33 U.S.C. §1282 (a)(1) as amended by Pub. L. No. 97-117, §7, 95 Stat. 1625 (1981). Where a grant applicant proposes to use accepted innovative or alternative treatment processes, the amount of any grant made after September 30, 1981, shall be funded at a rate 20 percentage points higher than for grants for conventional treatment processes, but in no no event shall such grant exceed 85 percent of the cost of construction. 33 U.S.C. §1282(a)(2) as amended by Pub. L. No. 97-117, §8, 95 Stat. 1625 (1981).

II.

Our Office has consistently followed the general rule that absent specific authority to the contrary, Federal grant-in-aid funds from one program may not be used to satisfy the local matching requirements of another Federal grant-in-aid program. 56 Comp. Gen. 645 (1977); 47 Comp. Gen. 81 (1967); 32 Comp. Gen. 561 (1953). This prohibition is generally applicable, even though not expressly stated, in the authorizing legislation. 59 Comp. Gen. 668, 670 (1980); 57 Comp. Gen. 710 (1978). Insofar as pertinent here, our review of the FWPCA's legislative history indicates that application of this general rule to the construction grants program is entirely consistent with Congress' desire that local communities undertaking a wastewater treatment project assume a share of the financial responsibility for addressing the problem of water pollution. Indeed, the requirement for a local financial stake in the grant project has been viewed as providing an additional assurance that projects will be designed, constructed and operated in the most efficient manner possible. 2/ See H.R. Rep. No. 92-911 at 89,356 (1972).

1/ CONTINUATION

An Office of Management and Budget Circular fills this hiatus with regulations of general applicability. See OMB Circular A-102, Attachment F, dated August 24, 1977.

2/ The Senate version of the Federal Water Pollution Control Act Amendments, S.2770, provided for a minimum Federal grant of 60 percent of the cost of sewage treatment facilities, increased to 70 percent if a State contributed through grants, not loans, 10 percent of the cost thereof. [CONTINUED]

What has been said this far does not mean, however, that grantees are precluded in all cases from using other sources of Federal funds to finance the grantee's match. As we noted earlier, where specific authority exists to use grant funds to pay the non-Federal share required by another Federal grant-in-aid program, these grant funds may be used to finance a grantee's local share. 56 Comp. Gen. 645 (1977); 52 Comp. Gen. 558 (1973). 3/

2/ CONTINUATION

Sen. Rep. No. 92-414 at 25-26 (1971). The House version, H.R. 11896, increased the Federal share to 75 percent if the State agrees to provide an additional 15 percent of the cost. H.R. Rep. No. 92-911 at 89 (1972). The State "matching share," as envisioned by the House Public Works Committee, could be provided "by any means (including loans), of funds * * *." Id. EPA comments submitted to the Chairman of the House Public Works Committee took exception to the increase of the Federal share to a maximum of 75 percent of the cost of construction. Id. at 152. In EPA's view,

> "* * * [t]he meaningful involvement and responsibility of States and local governments in this effort are absolutely essential if the programs are to work. This cannot be achieved without a commitment of substantial and local matching funds.
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> "When States and localities are obliged to contribute substantial portions of the costs of waste treatment facilities, it necessarily follows that all levels of government then endeavor to produce the needed facilities which can most effectively perform the task at the least possible cost." Id.

The Conferees "could not agree on the nature of state participation," 118 Cong. Rec. S16872 (1972), and, accordingly, set the Federal contribution at 75 percent.

3/ A difficult issue arises where the grantee attempts to use grant funds otherwise eligible to finance either in whole or in part a match under a second Federal grant, whose [CONTINUED]

Turning to the other Federal grant programs identified in your memorandum as sources of financing for a grantee's local share, several of these specifically authorize the use of grant funds to finance a grantee's match under another grant program. 4/ Thus, under section 105 of the Housing and Community Development Act of 1974, as amended, eligible community development activities include the "payment of the non-Federal share required in connection with a Federal grant-in-aid program undertaken as part of activities assisted under this chapter." 42 U.S.C. §5305(a)(9). Another example is supplementary economic development grants. 42 U.S.C. §3131(a)(2). Under this grant program, the Secretary of Commerce is authorized

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3/ CONTINUATION

authorizing legislation specifically precludes the use of funds from other Federal grant programs to finance its non-Federal share or match. See, e.g., 59 Comp. Gen. 668 (1980) and Comptroller General Report, Propriety of Land and Water Conservation Fund Assistance For Pioneer Courthouse Square Project, Portland, Oregon, CED-79-89 (1979). In these cases issue resolution turns even more on the individual circumstances of each case.

4/ We have found no authority in the authorizing legislation for Farmers Home Administration water and wastewater facility grants, 7 U.S.C. §1926(a)(2), and industrial development grants, 7 U.S.C. §1932(b-d), or Economic Development Administration public works and development facilities grants, 42 U.S.C. §3131(a)(1), to permit a wastewater facility construction grantee to use such grant funds to finance the local share of their wastewater facility construction grant. On the other hand, these grant programs (as well as those mentioned in the body of our discussion) appear generally suitable for joint funding of wastewater treatment projects in accordance with the provisions of OMB Circular No. A-111, dated July 6, 1976, issued pursuant to the Joint Funding Simplification Act of 1974, 42 U.S.C. 4251 (1976). Section 8(e) of such Act provides that where a project is supported by funds drawn from more than one Federal grant program, a single non-Federal share may be established according to the Federal share ratios applicable to the several grants programs involved and the proportion of funds transferred to the project from each of the grant programs. 42 U.S.C. 4257(e) (1976).

> "(2) to make supplementary grants in order to enable the States and other entities within redevelopment areas to take maximum advantage of designated Federal grant-in-aid programs (as hereinafter defined), * * * for which they are eligible but for which, because of their economic situation, they cannot supply the required matching share." Id.

The term "designated Federal grant-in-aid programs" includes grant programs "assisting in the construction or equipping of facilities as the Secretary may * * * designate as eligible * * *." 42 U.S.C. §3131(c); 13 C.F.R. 305.5.

The Appalachian Regional Development Act (ARDA) authorizes grants

> "* * * to be used for all or any portion of the basic Federal contribution to projects or activities * * * for the purpose of increasing the Federal contribution to projects under such programs * * * above the fixed maximum portion of the cost of such projects otherwise authorized by the applicable law." 40 App. U.S.C. §214(a).

Although the Appalachian Regional Development Act identifies Federal Water Pollution Control Act construction grants as eligible for supplemental funding, 40 App. U.S.C. §214(c), the combined FWPCA-ARDA portion of project costs shall not exceed 80 percent thereof. 40 U.S.C. §214(b).

Finally, the coastal plains supplemental grants program authorized by section 509 of the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. §3188a, was repealed by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Title XVIII, section 1821(a)(8), 95 Stat. 766 (1981), effective September 30, 1981. However, like grants under the Appalachian Regional Development Act, coastal plains supplemental grants could only be used to raise the combined Federal share to 80 percent of eligible wastewater treatment projects under the FWPCA. 42 U.S.C. §3188a(b,c).

III.

As a general proposition, we think that a grantee under Title II of the FWPCA may use Federal loans to finance its local share under the grant. Our general rule against using other Federal grant funds to finance a grantee's "match" under a second grant is by its own terms applicable only to grant funds, and, to our knowledge, has never been extended to restrict a grantee's use of otherwise eligible Federal loans to finance a local match. Cf. 32 Comp. Gen. 561 (1953). 5/ Nor do we think that the use

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5/ The District of Columbia (District) had obtained a statutorily denominated "grant" under section 1(c) of the Hospital Center Act, of which the District was obligated to repay 50 percent over a 33-1/3 year period without interest charged thereon. Since it was obligated to repay the Federal Government 50 percent of the grant, the District argued that it had received a loan that was available to finance the local share of a grant under the Hill-Burton Act. In rejecting the District's argument, our Office did not take the position that Federal loans may not be used to finance a grantee's matching share, but that the District misconceived the form of financial assistance received:

> "The contentions so made appear to arise from the misconception that 50 per centum of the grant made by the Federal Government pursuant to the Hospital Center Act constitutes a loan to the District of Columbia and that, in turn, the District of Columbia contributes such amount to Children's Hospital. However, the fact is that the entire amount involved, in its inception, is a grant of Federal funds to Children's Hospital under section 1 (c) of the act. The fact that, under section 5 of the act, the District of Columbia is required to pay 50 per centum thereof to the Federal Government over a period of 33-1/3 years in nowise affects the status of the funds at the time of the grant to Children's Hospital. Hence, this Office cannot subscribe to the view that, of the amount of the Federal funds obtained under the Hospital Center Act, 50 per centum represented a grant to Children's Hospital
> [CONTINUED]

of otherwise eligible Federal loans to finance the local match is inconsistent with the purpose underlying the construction grant program's match requirement. As we noted earlier, Congress apparently felt that a local financial stake in a grant project would provide additional assurance that projects will be built in the most efficient manner possible. Since Federal loans unlike Federal grants are by definition subject to repayment, the grantee in principle has no less a financial stake in the project than if the grantee had funded the match with an in-kind contribution or cash obtained from floating a municipal bond or from general tax revenues. Although a Federal loan may carry more attractive terms in a given case than could be obtained from a privately originated commercial loan, such factor standing alone should not be determinative. Instead, for audit purposes, the crucial inquiry should generally be whether the Federal loans in question may be made for the purpose of financing the construction of wastewater treatment projects. 6/

5/ CONTINUATION

> and 50 per centum was intended as a loan to the District of Columbia so as to constitute funds of the latter. Accordingly, there is no proper basis for using such funds to obtain a further grant under the Hill-Burton Act." (Emphasis added.)

We question whether the holding of this decision would be extended beyond the facts presented therein.

6/ Concerning the loan programs listed in your memorandum, an examination of the authorizing legislation indicates that each of these loan programs could conceivably be used to finance the construction of wastewater treatment projects, given the proper circumstances. Under section 306 of the Consolidated Farm and Rural Development Act, 7 U.S.C. §1926 (1976), the Secretary of Agriculture acting through the Farmers Home Administration may make or insure loans for the installation or improvement of waste disposal facilities servicing rural areas as defined therein. Similarly the Secretary of Agriculture has broad authority under sections 31 and 32 of the Bankhead-Jones Farm Tenant Act, as amended, 7 U.S.C. §1010 and 1011, to make loans to State and local [CONTINUED]

6/ CONTINUATION

public agencies to carry out projects to improve land uses, including projects to protect the public health and welfare.

Under title X of the National Housing Act, as amended, 12 U.S.C. §1749aa et seq., the Secretary of HUD may insure mortgages for land development and improvement as well as new community development. For purposes of such mortgage insurance, "improvements" include "waterlines and water supply installations, sewerlines and sewage disposal installations" and buildings needed in connection with a sewage disposal installation. 12 U.S.C. §1749aa(d). See also 12 U.S.C. §1715x, authorizing mortgage insurance secured by properties using advanced technology in housing design, materials or construction.

Under section 308(d)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. §1456, the Secretary of Commerce may make loans to coastal states and units of local government to assist them to provide new or improved public facilities required by coastal energy activity as defined therein. Similarly, under section 308(d)(2), and subject to the provisions of subsection (f) thereof, the Secretary may guarantee the payment of the principal and interest of bonds and other evidence of indebtedness issued by a coastal state or unit of local government to provide new public facilities required as a result of coastal energy activity. For purposes of this act, "public facilities" means "facilities * * * financed in whole or in part, by any state or political subdivision thereof, including but not limited to * * * waste collection and treatment * * *." 16 U.S.C. §1453(15).

The Secretary of Commerce also may make loans or purchase evidence of indebtedness to finance the development of land and improvements for public works, public service, and development facility usage under section 201 of the Public Works and Economic Development Act of 1965, 42 U.S.C. §3141.

cc: Mr. Hunter, OGC
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