

B-209872-O.M., Mar. 23, 1984

UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

March 23, 1984

TO : Senior Group Director, RCED - Sam A. Madonia
THRU: Senior Attorney, OGC - Gary L. Kepplinger
FROM : Attorney-Adviser, OGC - Doreen S. Stolzenberg
SUBJECT: State Maintenance of Effort Requirements and Carry-over of Federal Grant Funds Under Section 105(b) of the Clean Air Act (File B-209872; Code 089242)

At the request of the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, you are reviewing the Environmental Protection Agency's (EPA's) actions in monitoring State funding and expenditures under section 105(b) of the Clean Air Act (CAA), 42 U.S.C. § 7405(b). You asked for our views on two areas of concern: (1) maintenance of effort (MOE) requirements for State and local grantees and (2) carryover of unexpended grant funds to subsequent fiscal years. We discuss these issues below in the order presented.

I.

Maintenance of Effort Requirements

Section 105 of the Clean Air Act, 42 U.S.C. § 7405, authorizes the EPA Administrator to make grants to State and local air pollution agencies to assist them in carrying out programs for the prevention and control of air pollution. EPA awards section 105 grants annually. In order to receive grant funds in subsequent years, State and local governments must maintain their level of spending on air pollution programs for prior fiscal years (MOE requirement). In this regard, section 105(b) of the CAA provides in pertinent part as follows:

"No agency shall receive any grant under this section during any fiscal year when its expenditures of non-Federal funds for other than nonrecurrent expenditures for air pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year, unless the Administrator, after notice and

opportunity for public hearing, determines that a reduction in expenditures is attributable to a nonselective reduction in expenditures in the programs of all executive branch agencies of the applicable unit of Government; and no agency shall receive any grant under this section with respect to the maintenance of a program for the prevention and control of air pollution unless the Administrator is satisfied that such grant will be so used to supplement and, to the extent practicable, increase the level of State, local, or other non-Federal funds that would in the absence of such grant be made available for the maintenance of such program, and will in no event supplant such State, local, or other non-Federal funds.. * * *."

42 U.S.C. § 7405(b) (emphasis added).

EPA recently issued the following regulation concerning this MOE requirement.

"(a) To receive funds under section 105, an agency must expend annually for recurrent Section 105 program expenditures an amount of non-Federal funds at least equal to such expenditures during the preceding fiscal year, unless the Regional Administrator, after notice and opportunity for a public hearing, determines that the reduction is attributable to a non-selective reduction of the programs of all executive branch agencies of the applicable unit of government.

"(b) The Regional Administrator will not award Section 105 funds unless the applicant provides assurance that the assistance will not supplant non-Federal funds that would otherwise be available for maintaining the section 105 program."

40 C.F.R. § 35.210

EPA implements the regulation to allow a grantee-agency to limit what will be considered part of its air pollution

control program in order to avoid increases in its MOE level in future years. Although a grantee-agency may not recompute its existing MOE level, an agency may resubmit its entire air pollution control work program and select the activities which will constitute its section 105 program for the year. The next year, the agency must expend an amount of non-Federal funds for its section 105 program at least equal to such expenditures for the preceding year. If the agency increases its expenditures for air pollution control activities outside its approved section 105 program, EPA will not require it to maintain such increases. 47 Fed. Reg. 44,952 (1982).

You have asked our advice on the following issue: Pursuant to section 105(b) of the CAA, if a grantee's level of expenditures are less than the prior fiscal year's level of expenditures, can EPA reduce the subsequent fiscal year's grant award to such grantee by the proportionate amount, or must EPA refuse to award any grant to such grantee during the subsequent fiscal year? In our opinion, section 105(b) of the CAA precludes EPA from awarding any grant in the fiscal year when a grantee fails to meet its MOE requirement. The only statutorily recognized exception is where the Administrator determines that the reduction in expenditures is the result of an across-the-board reduction by the applicable State or local unit of government.

Read literally, the language of section 105(b) does not provide for a proportionate reduction in Federal grant funds corresponding to a grantee's reduction in air pollution expenditures. Instead, it clearly provides that "[n]o agency shall receive any grant" (emphasis added) when the MOE requirement is not met. 42 U.S.C. § 7405(b).

Thus, in the event air pollution expenditures are reduced without a corresponding proportionate reduction throughout the unit of government, air pollution grants may not be awarded for that fiscal year. Section 105(b)'s one exception permits the Administrator of EPA to waive the maintenance of effort requirement only under specified conditions, i.e., where (1) notice and opportunity for public hearing are given and (2) the Administrator determines that the reduction in expenditures by an air pollution agency is the result of an across-the-board reduction in all expenditures by the applicable State or local unit of Government.

The legislative history of section 105(b)'s waiver provision does not indicate that Congress intended to authorize either additional waivers or proportionate reductions in subsequent grants where grantees fail to maintain their level of effort. EPA's authority to waive the MOE requirement was added to the Clean Air Act by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 95th Cong., 1st Sess. (1977). Although the original House bill's amendment to section 105, H.R. 6161, 95th Cong., 1st Sess., would have authorized the Secretary to waive the MOE requirement on a case-by-case basis, the conference committee agreed to allow a waiver only under the conditions specified in the enacted law. H. Conf. Rep. No. 95-564, at 121 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 1503. According to the House Committee on Interstate and Foreign Commerce, the waiver provision was intended to give the Administrator adequate authority to respond to fiscal crises at the State and local level without resulting in a cutoff of Federal air pollution program grant support. H.R. Rep. No. 95-294 at 12, 201 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 1280. According to the House committee, the provision was not intended to permit a waiver where a State or local government merely chooses to spend less on air pollution control than it did previously for fiscal reasons, or where air pollution control is downgraded as a priority while other programs are upgraded. Id. at 1281.

Section 105(b) does not distinguish between nominal, i.e., de minimis, and significant grantee reductions in spending. Consequently, you expressed concern that complete termination of Federal air pollution grants in response to a grantee's failure to maintain its level of expenditures, even where the reduction is nominal, might penalize the very air pollution programs Congress sought to protect. You further pointed out that section 105(b) might act as a disincentive to State agencies to develop cost effective measures, as the resulting reduction in expenditures might jeopardize the State's federal air pollution grants.

To mitigate the potentially severe consequences that might result from grantee reductions in spending, and the consequent loss of federal grants funds, you may wish to present to the Congress, for its consideration, an amendment to

section 105 to permit proportionate reductions in Federal grant funds, rather than require preclusion of Federal grants, when spending is decreased. Accordingly, we suggest for your consideration, the following amendment to section 105(b):

"In any fiscal year when an agency's expenditures of non-Federal funds for air pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year, the grant received by the agency shall be reduced by no less than the same percentage reduction unless * * *."

We also wish to point out that the suggested amendment is consistent with the Comptroller General's recommendation in his report to Congress entitled "Proposed Changes in Federal Matching and Maintenance of Effort Requirements for State and Local Governments" (GGD-81-7) at 71 as well as the 1978 conclusion of the Advisory Commission on Intergovernmental Relations that there was "considerable doubt about the enforceability, and thus the effectiveness" of MOE requirements. See 1 Cappalli, Fed. Grants and Coop. Agreements § 4.10 (1982).

II.

Carryover Funds

The grant agreements you provided us indicate that EPA carries over unexpended grant funds to subsequent budget periods.^{1/} For example, the fiscal year 1982 allowable budget period cost for the State of Maryland Department of Health and Mental Hygiene was \$3,921,396. The 1982 budget

^{1/} The budget period is defined as:

"The period specified in the grant agreement during which granted Federal funds are authorized to be expended, obligated, or firmly committed by the grantee for the purposes specified in the grant agreement." 40 C.F.R. § 30.135-6.

included (1) a 1982 continuation award, as amended, of \$1,730,080; (2) carryover of fiscal year 1981 unexpended funds of \$172,804, and (3) non-Federal funds of \$2,018,512.

Air pollution control programs generally cover an indefinite project period,^{2/} composed of one or more budget periods. EPA awards a specified amount of money to the grantee for the first year of the grant; grantees reapply annually for continuation of the grants (continuation grants). Continuation of funding for subsequent periods is subject, of course, to the grantee meeting the MOE requirements of section 105(b) of the CAA, 40 C.F.R § 35.210, and other conditions in the grant or regulations. 40 C.F.R § 30.355.

Generally, the award is in the form of a letter-of-credit, and the grantee is permitted to draw the funds down as needed up to the full amount of the award for the particular budget period. 40 C.F.R. § 30.615-1. EPA regulations provide that payments should be made in a manner that will minimize the time elapsing between the transfer of funds from the United States Treasury and the disbursement of those funds by the grantee. *Id.* Accordingly, the grant agreements we examined provide that grantees may make cash drawdowns only when actually needed. As a result, the full amount of the grant is not always paid out in the fiscal year in which granted. Since, in most cases, grantees receive continuation grants, EPA carries over the previously awarded but unexpended funds to the grantee to spend in the subsequent fiscal year.

You ask whether EPA may legally carry over unexpended air pollution funds for expenditure by grantees in subsequent fiscal years. We think EPA may carry over the obligated but unexpended portion of a prior fiscal year's grant award.

^{2/} The project period is defined as:

"The period of time specified in the grant agreement as estimated to be required for completion of the project for which Federal grant support has been requested. It is composed of one or more budget periods." 40 CFR § 30.135-20.

It is well established that once an appropriation has been properly obligated, performance and the actual disbursement of funds may carry over beyond the period of obligational availability. 31 Comp. Gen. 608 (1952); 20 Comp. Gen. 370 (1941). In the case of EPA air pollution grants, execution of the grant award constitutes EPA's obligation of its appropriated funds to the extent of the full amount of funds provided in the agreement. 40 C.F.R. § 30.345-5; see 31 U.S.C. § 1501(a)(5). Once properly obligated, the grant funds remain available to EPA regardless of whether the full amount obligated is paid out to grantees in the fiscal year in which appropriated to and obligated by EPA if otherwise consistent with law. See B-164031.11-O.M., July 8, 1977. The amounts carried over are distinct from annual amendments increasing the amount of the awards, which are new obligations by EPA, chargeable to the appropriations current for that fiscal year. 37 Comp. Gen. 861 (1953); 39 Comp. Gen. 296 (1959); 41 Comp. Gen. 134 (1961).

You expressed concern whether there are any legal limitations on the amount of funds which may be carried over or the time in which EPA must authorize a grantee to expend the funds. While there is no specific limit on time or amount, funds carried over by EPA must be used for the fulfillment of obligations incurred during the fiscal year in which appropriated, i.e., to pay grants to carry out State or local air pollution programs. See 31 U.S.C. § 1502. In addition, EPA's grant award obligating the funds must be for a bona fide need arising in that fiscal year. An agency may not obligate funds from an annual appropriation which it knows, or reasonably expects, will not be required for the bona fide needs of that fiscal year (bona fide need rule)^{3/}. See, e.g., B-164031.11-O.M., above, citing 33 Comp. Gen. 90, 92 (1953). Thus, the bona fide need rule would prohibit EPA from obligating funds for grant awards far in excess of the

^{3/} If EPA did not obligate the funds through grant awards within the appropriation's period of availability, the funds would expire and be returned to the Treasury at the end of the fiscal year. 31 U.S.C. § 1552.

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grantees' anticipated needs and then retaining and carrying over the unexpended funds.

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