

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

October 22, 1993

MEMORANDUM

SUBJECT: Use of Clean air Act Title V Permit Fees as Match for
Section 105 Grants

FROM: Gerald M. Yamada Acting General Council

TO: Michael H. Shapiro, Acting Administrator
Office of Air and Radiation

Your staff has asked us to reconsider our July 2, 1993 determination that Clean Air Act (CAA) Title V operating permit fees cannot be used to meet the non-Federal matching requirements for section 105 grants. They advised us that the issue is of particular importance because some states have reduced appropriations for state air programs assuming, in the absence of a clear statement from EPA on the issue, that the fees could be used as match. While our reexamination of the issue has failed to yield legal support for use of the fees as match, we have identified several steps that might be undertaken to mitigate the affects of the states' inability to use permit fees to match grant funds.

ANALYSIS

As explained in our July 2nd memorandum (copy attached), Title V permit fees may not be used to match section 105 grants. In order to obtain a permit under Title V of the CAA, polluters must pay to the state a fee "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements". Sec. 502(b)(3)(A). Any such fees collected by a state "shall be utilized solely to cover all reasonable (direct and indirect) costs required to support the permit program." Sec. 502(b)(3)(C)(iii). EPA regulations likewise require polluters to pay an annual fee that is "sufficient to cover the permit program costs" and ensure that "any fee required...will be used solely for permit program costs." 40 CFR 70.9(a). Furthermore, states must demonstrate "how required fee revenues are used solely to cover the costs of meeting the various functions of the permitting program." 40 CFR 70.9(d).

In order to qualify as match, the costs incurred by a grantee must be allowable costs under the assistance agreement with the Federal government. Matching funds may only be used for authorized grant purposes. 40 CFR 31.24(a)(1); 31 Comp. Gen. 672, 677 (1952); Comp. Gen. Dec. No. B-149441 (Feb. 17, 1987). See also 40 CFR 30.307 (b) (4); 40 CFR 30.200 ("allowable costs," "cost sharing," "project." and "project costs"). Because the CAA requires that the permit program be funded solely from the fees collected, and the fees collected are to be used only for that purpose, permit program activity coats are not allowable costs under the section 105 grant program. Because the permit program coats are not allowable, the costs and the fees used to pay them cannot be used for 105 match.

We considered whether the fees are "program income." EPA's grant regulations provide that fees collected for services performed are considered program income. 40 CFR 31.25(a). Program income can be used as match if such use is expressly permitted in the grant agreement; however, the fees must be generated by a grant-supported activity. 40 CFR 31.25. Because the permitting program activities are not supported by 105 grants, the fees would not be program income from the 105 grant and, in turn, could not be used as match for the 105 program. Furthermore, use of fees as match could be viewed by Congress as inconsistent with clear legislative intent to create a totally separate funding mechanism for the permit program and to "greatly augment the State's resources to administer pollution control programs." S. Rep. No. 228, 101st Cong., 2d Sess. 348 (1989).

OPTIONS

While we have been unable to identify any legal bases to support the use of permit fees as match, there are several possible options for mitigating the potential adverse impacts on state air programs.

1. Federal grant monies could be advanced to a state and cost sharing deferred, thus permitting the state to pay its share later in the project, so long as the entire match is provided by the end of the project period. This would give state legislatures additional time to appropriate adequate matching funds.

2. Although states cannot use section 105 grants to pay for the operation of the permitting programs, section 105 grants could be used to assist in the development of the permitting programs prior to the time they are approved by EPA. Because costs incurred for these "ramp-up" activities have been funded as allowable costs under the 105 grant program, program income in the form of fees generated by these activities could be used to satisfy the 105 matching requirement, so long as such use is expressly permitted in the grant agreement.

3. Section 105 (c)(1), which addresses maintenance of effort, may provide a basis for exempting states from a portion of the matching requirements in certain limited circumstances. It requires EPA to:

revise the current regulations which define applicable nonrecurrent and recurrent expenditures, and in so doing, give due consideration to exempting an agency from the limitations of...[the section 105(a) match requirement] due to periodic increases experienced by that agency from time to time in its annual expenditures for purposes acceptable to the Administrator for that fiscal year.

While the primary objective of the provision presumably is to provide relief when states experience fluctuations in their 105 expenditures, the statutory language is very broadly worded. As a result, an argument can be made that under this provision the Agency may determine, by regulation, that a full or partial exemption from the match is warranted because of increased state expenditures resulting from the enactment of the permit fee program.

Such an exemption, if granted, should be temporary, emphasizing the transition to the new permit program (perhaps through FY 94). It should be crafted so that the permit program is not considered part of the 105 program so as to avoid bringing permit program costs into the maintenance of effort calculation as a recurrent 105 cost.

If you have any further questions, please feel free to call me at 260-8040 or have your staff call Susanne Lee at 250-5326.

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

July 02, 1993

MEMORANDUM

SUBJECT: Use of Title V Permit Fees to Meet
Section 105 Match

FROM: Stephen G. Pressman
Assistant General Counsel for Grants

TO: Jerry A. Kurtzweg, Director
Office of Program Management Operations
Office of Air and Radiation

You asked for our opinion regarding the ability of state and agencies to use Clean Air Act Title V operating permit fees to meet the non-federal matching requirements for section 105 grants. We do not believe that Title V fees may be used for this purpose under the current EPA interpretation of section 502. A different interpretation may be possible that would allow fees to count toward the section 105 match requirement, though I am not recommending that.

As we discussed in our meeting on June 14, 1993, matching funds, like grant funds themselves, can be used only for grant-eligible purposes. Thus, matching funds for section 105 grants must be used for activities that could have been funded with 105 grant funds. However, under the Agency's interpretation of section 502, Title V permit fees must pay for all permit program activities, therefore such activities cannot be funded with section 105 grant funds. Since section 105 grant funds cannot be used for Title V activities, neither can section 105 matching funds.

It may theoretically be possible to avoid the adverse impacts of the inability to match section 105 grant funds with Title V permit fees by reconsidering the Agency's interpretation of section 502. Under that interpretation, Title V activities must be paid for solely with permit fees and the fees may not be used for any other purpose. This is reflected in the Agency's regulations, which provide that states must demonstrate "how required fee revenues are used solely to cover the costs of meeting the various functions of the permitting program." 40 C.F.R. § 70.9(d). Under this interpretation, Title V activities are ineligible for section 105 grant funds and therefore cannot be funded with 105 matching funds. This is clearly the most reasonable interpretation of the language in section 502(b).

However, section 502 (b) does not explicitly require that Title V activities be paid for solely with permit fees. The section requires that an owner or operator pay a fee "sufficient to cover" the cost of all permit program requirements. Section 502(b)(3)(A). It may be possible to argue that this requires only that fees in a certain amount be paid, and does not dictate how those fees must be paid. Under this interpretation, fees could be used for other air pollution control program purposes, as well as operating permit program costs. In that case, 105 grant funds also could be used for both permit program costs and other air pollution control program costs. Permit program costs could then be included as section 105 matching costs. This would be true even if permit fees were actually used to pay for the costs.

Such an interpretation of section 502(b) would be extremely difficult to defend. Although the plain language of the section does not explicitly preclude this interpretation, the legislative intent seems clearly to have been that fees be used only to pay for permit program costs. In addition, the purposes of the section 105 match requirement, i.e., to demonstrate state commitment to the work and raise additional funds, would be frustrated. Furthermore, this approach would require reversing positions the Agency has taken in guidance and regulations. For these reasons, I do not recommend this option.

If you have any questions, please call me at 260-7725.