



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

August 23, 2001

OFFICE OF
WATER

CWSRF 01-9

MEMORANDUM

SUBJECT: Class Deviation from 40 CFR 35.3125(b)(1)

FROM: Kit Farber, Acting Chief /s/
State Revolving Fund Branch

TO: Clean Water State Revolving Fund Regional Coordinators

We are in the process of revising the Clean Water State Revolving Fund (CWSRF) regulations at 40 CFR 33.3125(b)(1) to allow non-Federal, non-State CWSRF funds to be used to match most EPA grant funded treatment works projects, including special Appropriation Act projects. Since the revision to the CWSRF regulations may take a considerable amount of time, we are issuing the attached class deviation to avoid the need to process individual requests for a deviation from 40 CFR 35.3125(b)(1) during this interim.

If you have any questions, please call Sheila Platt at 202-564-0686 or Larry McGee of the Municipal Assistance Branch at 202-564-0619.

Attachment

August 16, 2001

MEMORANDUM

SUBJECT: Class Deviation from the Provisions of 40 CFR 35.3125(b)(1)

FROM: Marty Monell, Director /s/
Grants Administration Division (3903R)

TO: Richard Kuhlman, Director
Municipal Support Division (4204M)

SUMMARY

I am approving a class deviation from the provisions of 40 CFR 35.3125(b)(1) for the Clean Water State Revolving Fund (CWSRF) program. My approval will allow States to use non-Federal, non-State match CWSRF funds to provide loans that can be used to satisfy the local matching requirement for most EPA grant funded treatment works projects, including special Appropriations Act projects. The prohibition on the use of CWSRF loans as the match for Title II construction grant projects will continue.

BACKGROUND

This class deviation concerns the use of Clean Water State Revolving Fund (CWSRF) loans as the match for EPA grant funded treatment works projects. In 1990, EPA issued regulations implementing the CWSRF program authorized by Title VI of the Clean Water Act (CWA) Amendments of 1987. The regulations at 40 CFR 35.3125(b)(1) contain a requirement based on CWA section 603(h), which prohibits the use of CWSRF loans as the non-Federal share of the costs of a treatment works project for which a recipient is receiving assistance from the Agency under any authority.

In issuing its regulations at 40 CFR 35.3125(b)(1), EPA interpreted section 603(h) broadly and applied the restriction to all EPA grant funded treatment works projects. At that time, EPA believed that replacing the CWA Title II construction grants program with the CWSRF program would significantly decrease Federal grant funds for treatment works projects. However, since fiscal year (FY) 1992, Congress has authorized and appropriated more than \$3.5 billion in grant funds for more than 700 infrastructure projects in the State and Tribal Assistance Grants (STAG) account of the various Appropriations Acts. Consistent with legislative history, EPA has generally required these grant recipients to provide a 45 percent match for the special Appropriations Act projects.

Over the last several years, the Agency has been asked by a number of States to reexamine section 603(h) of the Clean Water Act and reevaluate the prohibition of using a loan from a CWSRF program as the match for EPA grant funded treatment works projects, especially special Appropriations Act projects. In response to these requests, the Agency reviewed the legislative history and facts associated with section 603(h) and concluded that the initial reading of section 603(h) was unnecessarily broad, and the intent of Congress was to prohibit the use of CWSRF loans as the match for Title II construction grants only. Accordingly, the Agency has initiated action to revise the regulation at 40 CFR 35.3125(b)(1). Since this change may take a considerable period of time to finalize, this class deviation will avoid the need to process individual requests for a deviation from 40 CFR 35.3125(b)(1) during this interim period.

ACTION

Under the authority of 40 CFR § 31.6(d), I am approving a class deviation from 40 CFR 35.3125(b)(1). This class deviation will allow the non-Federal, non-State match CWSRF funds to be used to provide loans that can be used as the match for all EPA grant funded treatment works projects, except construction grant projects authorized by section 201 of the Clean Water Act.

As a general rule, funds received under one Federal grant may not be used for the matching share required by another Federal grant, unless the statute specifically authorizes it. However, Title VI of the Clean Water Act, which is the authorizing authority for the CWSRF program, does not contain such language. Accordingly, the EPA capitalization grant funds that are provided for the CWSRF program cannot be used to provide loans for EPA grant funded treatment works projects, if the loan funds are to be used to satisfy the local share matching requirement for these projects. Similarly, the statutory mandated 20 percent State contribution to the CWSRF (i.e., the State match) cannot be used to provide loans for EPA grant funded treatment works projects, if these loans are to be used as the local match, as this action would result in the same funds being used to match two separate programs.

For the reason listed above, this class deviation only allows the non-Federal, non-State CWSRF funds to be used to provide loans for EPA grant funded treatment works projects, other than construction grant projects, if the loan funds are to be used to satisfy the local share matching requirement for these projects. Non-Federal, non-State match funds include repayments, interest earnings, bond proceeds and other State contributions.

The use of a loan from the CWSRF to provide part or all of the match for EPA grant funded treatment works projects is a State CWSRF program agency decision. However, the action must be consistent with established State policy, guidelines and procedures governing the use of CWSRF loans. Projects that receive assistance must also adhere to Federal CWSRF program requirements relating to eligibility and prioritization within an Intended Use Plan (i.e., included on a project priority list that has been subject to public review).

There is no implementation date for this class deviation. This change can be applied to any EPA grant funded treatment works project, other than a construction grant project, regardless of the date of grant award, or the date that the funds were appropriated for the project. The application of the provisions of this class deviation is at the discretion of the State agencies responsible for issuing CWSRF loans.