United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

Memorandum

JUL 29 1999

To: Program Manager
Natural Resource Damage Assessment and Restoration Program

From: Assistant Solicitor
Fish and Wildlife and Environmental Protection

Subject: Utilization of Natural Resource Restoration Joint Recoveries as "non-Federal" Monies for Matching Federal Grants.

This responds to your request for an opinion as to whether funds deposited into the Department of the Interior's Natural Resource Damage Assessment and Restoration Fund (the "Fund"), pursuant to a joint recovery by the Department of the Interior and non-Federal trustees under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Oil Pollution Act (OPA), may be transferred to a non-Federal trustee and thereafter utilized as a "non-Federal" match for a Federal grant program. You have also raised the related question whether monies transferred from the Fund to a Federal trustee agency account, and then paid to a non-Federal entity, may be characterized as a "non-Federal" match for a Federal grant program.

It is our opinion that monies deposited into the Fund pursuant to a joint and indivisible recovery by the Department and a non-Federal trustee, and subject to some joint and binding control by the non-Federal trustee, may be transferred to the non-Federal trustee and subsequently characterized as non-Federal funds for the purpose of serving as a match for a Federal grant. Implicit in this finding, however, is the realization that ultimately, it is for the co-trustees to agree that monies from the Fund should be made available to such a non-Federal trustee and allowed to be proffered as a non-Federal match to accomplish an appropriate project consistent with the settlement agreement and the provisions of CERCLA and OPA, and for the Federal agency making the grant to determine that such a project, utilizing such monies from the natural resource restoration recovery as the non-Federal match, will accomplish an objective consistent with the Federal program providing the grant funding. In response to your related question, if jointly-recovered monies deposited into the Fund are transferred to a Federal trustee agency account, and then paid to a non-Federal entity, it is our view that the non-Federal entity may not use those monies to satisfy a "non-Federal" match for a Federal grant program.

In making general assertions in the context of this opinion, it should be noted that language in statutes authorizing Federal grants vary in characterizing the terms of "non-Federal" matching funds that may be required. For example, the Federal Aid in Wildlife Restoration Act, 16 U.S.C. 669-669i, and the Federal Aid in Fish Restoration Act, id. 777 et seq., state that the United States share of grants under these statutes shall not exceed 75 percent, without specifically referencing the source of the remaining 25 percent. However, the regulations implementing these statutes refer to the 25 percent match as the "state share" and the "non-Federal share." See 50 C.F.R. 80.12(b) and 50 C.F.R. 81.8(b). The North American Wetlands Conservation Act, 16 U.S.C. 4401 et seq., on the other hand, states that "the non-Federal share of ...such projects may not be derived from Federal grant programs." Id. 4407(b).

Although we have not surveyed each of the specific matching requirements within the wide myriad of Federal grant programs, at least in the context of the above-referenced programs and those with similar requirements, we conclude, based on the nature and control of the funding derived from joint and indivisible Federal–non-Federal restoration recoveries and the appropriations language making monies available from the Fund, that such funds can be transferred to non-Federal trustees and made available by appropriate grantee applicants as "non-Federal" funds for purposes of Federal grants.

The general regulations regarding "matching or cost sharing" for state and local governments and for non-profits are found in OMB circulars A-102 and A-110, respectively. These OMB provisions are incorporated into the Interior Department's regulations at 43 C.F.R. Part 12. The basic rule for state and local governments is that a cost sharing or matching requirement "may not be met by costs borne by another Federal grant." 43 C.F.R. 12.64(b)(1). The applicable rule regarding non-profits states that matching contributions must not be "paid by the Federal government under another award." 43 C.F.R. 12.923(a)(5).

The nature of the monies acquired as the result of joint recoveries by Federal and non-Federal trustees, deposited into the Fund and dispensable only upon the agreement of the Federal and non-Federal trustees, is such that monies transferred out of the Fund to non-Federal trustees for approved purposes clearly do not constitute "Federal grants" or "Federal awards." The transfer of these monies from the Fund to the non-Federal trustee is not subject to federal contracting, grant or cooperative agreement requirements under terms of the Grants and Cooperative Agreements Act, 31 U.S.C. 6305 et seq. Likewise, subsequent transfers of these funds from non-Federal trustees to other designated parties, as appropriate, would also not be subject to such federal requirements.[1]

Further, Congress specifically recognized the nature of this possible joint trustee responsibility between Federal and non-Federal trustees when it authorized in the FY 1998 Interior

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[1] Once received by the non-Federal trustee, they may, however, be subject to similar state requirements.

Appropriations Act, Pub. L. 105-83, that, "notwithstanding any other provision of law," amounts credited to the Fund, may be transferred to any account, including "payments to non-Federal trustees," to carry out provisions of negotiated settlements and other actions for restoration activities under the appropriate statutes. See 43 U.S.C. 1474b-1.[2]

In this rather unique situation involving joint Federal–non-Federal recoveries and statutory language envisioning administration of such joint recoveries by the Fund, it is our opinion that the transfer of monies from the Fund at the direction of a trustee council, made up of Federal and non-Federal trustees, to a participating non-Federal trustee, does not constitute "Federal assistance" or a "Federal grant," as would typically disqualify such funding from being used as a match for Federal grant programs. This same result would apply to similar monies distributed from a court registry account.

Conversely, however, it is also our opinion that monies transferred from the Fund to a Federal trustee agency pursuant to the authority in the Fund appropriations language, and subsequently paid to a non-Federal entity pursuant to other federal authorities, would not be able to be characterized as "non-Federal." Thus, to exercise the ability to use jointly-recovered monies deposited in the Fund as a non-Federal share, they must first be paid from the Fund to a participating non-Federal co-trustee.

Again, we point out that it is ultimately up to the awarding Federal agency to make determinations as to matching requirements of their specific grant programs. Additionally, while this opinion concludes that monies distributed from the Fund to a non-Federal trustee under certain conditions may be considered "non-Federal" for purposes of matching Federal grants, we do not address or characterize the "Federal" or "non-Federal" character of these funds for any other purposes.

If you have any further questions regarding this opinion please feel free to contact me or Larry Mellinger, of my staff, at 202-208-6172.

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[2] Funds are transferred to federal agency trustees in the form of a non-expenditure transfer, while funds to non-Federal co-trustees are transmitted via check or equivalent wire payment.