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ENERGY CONSERVATION GRANTS UNDER THE NATIONAL ENERGY CONSERVATION POLICY ACT OF 1978

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The National Energy Conservation Policy Act[1] is a federal grant program, the purpose of which is to assist financially nonprofit schools, hospitals, units of local government and public care institutions in energy conservation.

DEFINITIONS

Under the Act, a school is defined as follows:

> a public or nonprofit institution which —
>
> (A) provides, and is legally authorized to provide, elementary education or secondary education, or both, on a day or residential basis;
>
> (B) (i) provides, and is legally authorized to provide a program of education beyond secondary education, on a day or residential basis;
>
> (ii) admits as students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate; and
>
> (iii) is accredited by a nationally recognized accrediting agency or association; and
>
> (iv) provides an educational program for which it awards a bachelor's degree or higher degree or provides not less than a two-year program which is acceptable for full credit toward such a degree at any institution which meets the requirements of clauses (i), (ii), and (iii) and which provides such a program;

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[1] Pub. L. No. 95-619, 92 Stat. 3206 (1978).

(C) provides not less than a one-year program of training to prepare students for gainful employment in a recognized occupation and which meets the provisions of clauses (i), (ii), and (iii) of subparagraph (B) or

(D) is a local educational agency.

A local educational agency is defined as:

a public board of education or other public authority or a nonprofit institution legally constituted within, or otherwise recognized by, a State for either administrative control or direction of, or to perform administrative services for, a group of schools within a State.

Under the Act, a diocese may apply for funds under the program as long as it is recognized by a state as performing either administrative control or direction of a group of schools within a state. Independent schools are free to apply on their own.

School facilities are defined as:

buildings housing classrooms, laboratories, dormitories, athletic facilities, or related facilities operated in connection with a school.

In the Administration's original proposal, school facilities were defined so as not to include any facility used for sectarian instruction or as a place for religious worship. This provision would, of course, have severely limited participation by church-related elementary and secondary schools and some college facilities. It was felt by many that it was not in conformity with the general emphasis of the Act as an effort to conserve energy and efforts were made to remove this restriction. The present bill contains no restrictions on participation in the program by church-related institutions. In fact, it is clear from the legislative history of the law that Congress wished Catholic parochial elementary and secondary schools to participate in the program. The House Report stated that the action of the Committee in changing the language of the law added a large number of private and secondary schools with sectarian affiliations.

Hospitals are also included in the grant program. A hospital is defined for purposes of the Act as follows:

a public or nonprofit institution which is —

(A) a general hospital, tuberculosis hospital, or any other type of hospital, other than a hospital furnishing primarily domiciliary care; and

(B) duly authorized to provide hospital services under the laws of the State in which it is situated.

This definition excludes rehabilitation facilities, nursing homes and public health centers. These institutions are only entitled to the more limited grant program for units of local government and public care institutions.

The term "hospital facilities" under the law means buildings housing a hospital and related facilities including laboratories, outpatient depart-

ments, nurses' homes and training facilities and central service facilities operated in connection with a hospital. It also includes buildings housing education or training facilities for health profession personnel operated as an integral part of a hospital.

Under the Act only buildings completed on or before April 20, 1977 and which have a heating or cooling system are included in the scope of this program.

The grant program's purpose is to provide financial assistance to nonprofit schools and hospitals for energy conservation. There are four parts to the program. Each part is valuable to the institutions' efforts to conserve energy, as well as being a step toward the next part of the program.

PRELIMINARY ENERGY AUDITS

The first part of the program is the preliminary energy audit. This is a determination of the energy consumption characteristics of a building, including its age, type and rate of energy consumption, and its major energy-using systems. The purpose of the preliminary energy audit is to provide general information to the states for the preparation of their state plans. They are to be conducted within a short time frame and are not intended to be costly or complex. One requirement of the state plan, as will be seen later, is that it include the results of the preliminary energy audit.

The states are the grant recipients under this part of the grant program and have the responsibility to see that it is carried out. In most cases, the states will be entitled to receive fifty percent of the costs of the preliminary energy audit from the Federal Government. The state must pay for the other half itself. Upon request, the Federal Government may make grants to a state for up to 100 percent of the preliminary energy audit. The total amount allocated to the state, however, is reduced by an amount equal to the excess over fifty percent. This amount is reallocated to the other states. Also, if a state, without the use of financial assistance, conducts preliminary energy audits which comply with guidelines prescribed or approved by the Department of Energy (DOE), the funds allocated for purposes of this section shall be added to the funds available for energy conservation projects for that state. In other words, if a state has already performed energy audits which are acceptable, it can reserve more money for the other parts of the program, that is, energy conservation projects.

Congress made it clear in the legislative history of the Act that it wished DOE to allow the states a maximum degree of flexibility in satisfying the requirements of this preliminary energy audit in order to allow the rest of the program to commence as expeditiously as possible. The

regulations should reflect this flexibility.

The states have the major responsibility for the preliminary energy audits. They must make the effort to audit as many institutions as possible for purposes of their state plans. It can do this either through individual contact or some method of sampling. It is important to note, however, that Catholic institutions must be included in the range of those audited under the program.

ENERGY AUDIT

Similar to the preliminary energy audit, in both scope and purpose, is the second part of the energy grant program, energy audits. An energy audit is defined as:

> a determination of the energy consumption characteristics of a building which —
>
> (A) identifies the type, size, and rate of energy consumption of such building and the major energy using systems of such building;
>
> (B) determines appropriate energy conservation maintenance and operating procedures; and
>
> (C) indicates the need, if any, for the acquisition and installation of energy conservation measures.

The purpose of the energy audit is to provide a mechanism for identifying energy conservation maintenance and operating procedures, and determining whether there is likely need for the installation of an energy conservation measure.

The rules for energy audits are similar to those for preliminary energy audits. Generally, only fifty percent of the audit is paid by the Federal Government. If a grant for more is made, then the excess is subtracted from the state's allocation. In addition, if energy audits are conducted by the state without financial assistance, this money is added to the funds available for energy conservation projects in the state.

The states are responsible for completing the energy audits. It can be expected that they will either use their own manpower to complete them or contract them out to either the institutions themselves or a private contractor, such as an engineering school.

TECHNICAL ASSISTANCE

The next part of the program is technical assistance. This is assistance to conduct specialized studies identifying and specifying energy and related costs savings. It is essentially a more detailed energy audit. This information is useful for modification of operating and maintenance procedures, thus enabling the institution to achieve the most cost-effective energy conservation. Again only fifty percent funding from the Federal

Government is available.

Technical assistance makes up, together with an energy conservation measure, an energy conservation project. These projects are the subject of the grant application to the Federal Government.

ENERGY CONSERVATION MEASURES

An energy conservation measure is the final part of the grant program. It is the installation, or modification of an installation, in a building which is primarily intended to reduce energy consumption or allow the use of an alternative energy source, for example: insulation, storm windows and doors, solar heating or cooling systems, solar water heating systems, or furnace or utility plant modifications. Measures that will save a substantial amount of energy that are identified in an energy audit will also be allowed.

It is important to emphasize that those examples listed in the law, including those mentioned, are not exclusive. The list is only advisory and neither mandates any measures nor excludes others that can be shown to be cost effective. Applicants should not rule out any measure in advance, if it is thought it will be useful to conserve energy.

STATE PLANS

In order for a school or hospital to qualify for federal financial assistance, the state in which it is located must have a state plan. This plan must include the results of the preliminary energy audits and an estimate of the energy savings that may result from the modification of maintenance and operating procedures and the installation of energy conservation measures in the schools and hospitals in the state. It must also include:

> (2) a recommendation as to the types of energy conservation projects considered appropriate for schools and hospitals in such State, together with an estimate of the costs of carrying out such projects in each year for which funds are appropriated.
>
> . . . .
>
> (4) procedures to insure that funds will be allocated among eligible applicants for energy conservation projects within such State, including procedures —
>
> (A) to insure that funds will be allocated on the basis of relative need taking into account such factors as cost, energy consumption and energy savings, and
>
> (B) to insure that equitable consideration is given to all eligible public or nonprofit institutions regardless of size and type of ownership.

The Secretary of DOE has 60 days to review this plan. If the state plan is timely and has not been disapproved within 60 days, it shall be

treated as approved.

There are two parts of the state plan which are of special importance. The first is the equitable consideration provision. A state plan must contain procedures so that every eligible institution is given a fair opportunity to participate in the program. This means no applicant can be rejected merely because of its religious affiliation. The second is the requirement for procedures for the implementation of energy-conserving maintenance and operating procedures in those facilities for which projects are proposed. The states are required to insure that institutions which wish to participate in this program continue to conserve energy.

APPLICATIONS BY SCHOOLS AND HOSPITALS

Applications for financial assistance shall not be made more than once a year. All applications are submitted to the state. The state then reviews them to determine whether they are in accordance with the state plan, the law and regulations. It will also rank the applications in priority in accordance with the criteria specified in the state plan.

All applications are to be approved as consistent with the appropriate "state hospital facilities agency" or the "state school facilities agency." These terms are defined as follows:

> (1) 'State hospital facilities agency' means an existing agency which is broadly representative of the public hospitals and the nonprofit hospitals, or, if no such agency exists, an agency designated by the Governor of such State which conforms to the requirements of this paragraph.
>
> (2) 'State school facilities agency' means an existing agency which is broadly representative of public institutions of higher education, nonprofit institutions of higher education, public elementary and secondary schools, nonprofit elementary and secondary schools, public vocational education institutions, nonprofit vocational education institutions, and the interests of handicapped persons, in a State or, if no such agency exists, an agency which is designated by the Governor of such State which conforms to the requirements of this paragraph.

The state hospital facilities agency in many cases already exists. They are the state health planning and development agencies. The state school facilities agency will have to be established by the state.

Once the applications are reviewed, approved, and ranked, they are forwarded annually to DOE. The Department of Energy then makes the grants directly to the schools and hospitals and not to the states, except, of course, for the audit program.

The Administration's approach in this area was to make the grants directly to the states. A number of organizations, including the Conference, felt, however, that this would mean that church-related institutions in states where there are constitutional barriers to the granting of money

to sectarian institutions would not receive funding. This has been the experience under similar programs, such as the school lunch program. At their urging, the funding mechanism was changed to direct federal funding such as done in the Hill-Burton Act. Congress stated that in making this change it was its specific intent to assure that all institutions covered by the Act would be given equal consideration in the granting of financial aid, without regard to size or type of ownership.

As mentioned earlier, federal financial assistance will not exceed fifty percent of the costs of any energy conservation project. The other half must be made available from other than federal sources. The original Administration proposal, however, was only forty percent funding. In some cases DOE may make a grant for up to ninety percent of the cost of an energy conservation project if the criteria of hardship are met.

The law states that neither schools nor hospitals in a state shall be allocated less than thirty percent of the funds for energy conservation projects. This is to ensure that no group in any state receives a disproportionate share of the money available.

LEGAL PROBLEMS

That is a brief outline of the law. I now want to address a number of legal problems that either have arisen or might arise, and which eventually could end up on one of your desks as a diocesan attorney. A number of other problems have developed, or at least been seen as potentially difficult. One is the question of the allocation of an energy conservation measure between an eligible and an ineligible institution. For example, a school is an eligible institution, but a church building is not eligible. How do you treat the installation of a furnace that might service both? In such a case, we believe that an energy conservation measure that cannot be limited to an eligible institution should not be requested. When you have this situation, requests should be limited to divisible projects, such as storm windows and doors.

Another problem that has been contemplated is more financial than legal, although legal interpretation of the statute and the regulations is required for a solution. The problem is basically the requirement for the fifty percent match to the federal funds. The law states that the other fifty percent has to come from nonfederal sources. But it does not state that it has to be the applicant's money. So it is possible that it can come from the state or local governments. It also does not have to be cash. There is provision made for in-kind services. Innovative financing techniques can go a long way to assist the dioceses' participation in this program without a large drain on resources.

Thus far we have discussed the Energy Act's application to schools and hospitals. There is also a grant program for what are called "public

care institutions." These are:

> public or non-profit institution[s] which own —
>
> (A) A facility for longterm care, a rehabilitation facility, or a public health center, as described in Section 1633 of the Public Health Service Act.
>
> (B) A residential child care center. [An institution, other than foster home, operated by a public of nonprofit institution and is primarily intended to provide full-time residential care with an average length of stay of at least 30 days for at least 10 minor persons who are in the care of such institution as a result of a finding of abandonment or neglect or of being persons in need of treatment or supervision.]

A review of the law and its legislative history indicates that the following types of charitable institutions would fall under the definition of "public care institutions": nursing homes, institutions for dependent or neglected children, institutions for problem children except for those dealing with delinquent children, and group homes for children.

The following types of charitable institutions do not meet the definition of "public care institution": group homes for the elderly, day care facilities, maternity homes, foster homes, halfway homes, and youth camps.

The grant program for public care institutions includes all the aspects of the grant program except the energy conservation measures. The program has a separate monetary allocation.

The participation of these institutions raises the issue of dual use. If an institution is utilized, for example, as both a residential child care center and a school, which program does it participate in, the full program or the more limited one? The answer to this question depends on the interpretation given to the law by the state. We hope that the states will be flexible in their interpretation of the law in order to minimize conflict. The Department of Energy has informed us that it will watch the interpretation of the law by the states to insure consistent interpretation.

The final problem is one that has been foremost in the minds of many who have looked into the grant program. The question is essentially: does the acceptance of federal grant money under this program require the recipient to comply, both substantively and procedurally, with various governmental civil rights regulations?

The Department of Energy has issued proposed regulations on the matter of nondiscrimination in federally assisted programs. The proposed regulation is comprehensive in nature. It covers, at the present time, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1977, and Section 504 of the Rehabilitation Act of 1973. The purpose of these regulations is to prohibit discrimination in programs and activities receiving federal assistance from DOE.

There is no question that if anyone of our institutions receives direct

financial assistance under either the technical assistance aspect or the energy conservation measure aspect of the program or both, then it is a recipient for purposes of the DOE regulations. This means, of course, that the institution would have to comply with the DOE regulations.

It is not our understanding, however, that because an institution is a recipient under the Energy Act, it will then become the recipient for purposes of civil rights regulations administered by other agencies. For example, let us say that a parochial school participates in the Elementary and Secondary School Act (ESEA) program. It then receives an energy grant. It then is charged and found guilty of violating one of DOE's civil rights regulations. It is now possible for DOE to cut off the energy grant funds, but this does not mean that the HEW program will also be cut off since the school is still not considered a recipient under ESEA. Characterization under the Energy Act would not necessarily carry over to another agency. Therefore, the real concern in the civil rights area at this time is the DOE regulations themselves. At this time, we are awaiting their final publication.