

MEMORANDUM

State of Alaska
Department of Law

TO: Keith Kelton, Director
Facility Construction & Operation
Department of Environmental
Conservation

DATE: December 31, 1996

FILE NO.: 663-97-0242

TELEPHONE NO.: 465-3600

SUBJECT: Loan Repayment

FROM:
Assistant Attorney General
Natural Resources Section

Robert K. Reges

QUESTION AND SHORT ANSWER

You have asked whether the recipient of a Village Safe Water grant may use that money to repay a loan received from Alaska's Clean Water Fund. Yes, the recipient may do so if this intent is made known to, and approved by, the legislature.

ANALYSIS

Section 601 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. • 1381, authorizes the United States Environmental Protection Agency (EPA) to capitalize water pollution control revolving funds in each of the 50 states. To accept and implement that federal grant program, Alaska established the Alaska Clean Water Fund (ACWF). AS 46.03.032. Administered by the Department of Environmental Conservation (DEC), the ACWF is a source of money that is loaned to government subdivisions so they may plan, design, build, construct, or rehabilitate waste treatment systems, including solid waste systems. AS 46.03.032(d)(2).

ACWF loans are subject to numerous conditions and restrictions, one of which is pertinent here. An applicant for ACWF funds must submit

documentation of the availability of, and the commitment to use,
one or more dedicated sources of revenue for repayment of the
loan

18 AAC 76.030(a)(4). This requirement has its genesis in section 603 of FWPCA, 33 U.S.C. • 1383, which commands that before "section 601 money" is transferred to a state, the state must ensure that "the recipient of a loan establish[es] a dedicated source of revenue for repayment" 33 U.S.C. • 1383(d)(1)(C).

In 1996, the City of Kotzebue applied for and received \$600,000 from ACWF. That loan enabled Kotzebue to purchase a solid waste bailer. To comply with 18 AAC 76.030(a)(4), Kotzebue's application stated that user fees would be dedicated to repayment of the loan and would be sufficient to make the necessary payments. Kotzebue has, in fact, been collecting user fees and will make payments on the ACWF loan, so, currently, the city is compliant with loan conditions.

Desiring an alternate source of repayment, Kotzebue has applied for a grant under the Village Safe Water Act (VSW). AS 46.07. Under the VSW, money is given to various entities, with no obligation of reimbursement, for the purpose of providing safe water and hygienic sewage disposal facilities. Kotzebue's plan raises a question: may the city use a VSW grant to pay off the ACWF loan that was used to purchase the bailer?

There is no doubt that Kotzebue could have used the VSW funds to directly purchase the bailer. It has long been the rule that equipment designed to handle solid waste can be purchased, repaired, or otherwise financed with a VSW grant. Inf. Op. Att'y Gen. J-66-039-81 (Sept. 5, 1980).¹ In fact, when the legislature appropriates money for VSW grants it declares, in general terms, the allowable uses of the grant and many such grants have been made for purposes related to solid waste. *E.g.* pg. 56, lines 25-26 and pg. 57, lines 11-12, sec. 135, ch. 103, SLA 1995 ("Fort Yukon-Master Plan/Solid Waste"; "Noatak-Sanitary Landfill Improvements"). We see no significant distinction here. Ultimately, albeit indirectly, the funds will pay for solid waste handling equipment that has the effect of protecting the purity of Kotzebue's water.

¹ Early opinions by this office doubted that "solid waste facilities" could be financed with VSW grants because the VSW statutes speak only of "safe water and hygienic sewage disposal facilities." *E.g.* Inf. Op. Att'y Gen. J-66-544-79 (June 13, 1979). Apparently this office overlooked the nexus between water, sewage, and solid waste. First, sewage solids and sewage sludge are solid wastes. AS 46.03.900(23), (25); 18 AAC 60.365 and 60.990(125) (1996); *See also* 45 Fed. Reg. 76,080 (1980) (sludges generated in the treatment or storage of any incoming domestic sewage mixture may be solid wastes) and H.Rpt. No. 94-1491, Part 1, 94th Cong., 2d Sess. (1976) at 4 ("solid waste, the traditional term for trash or refuse is . . . laden with false connotations. [Solid waste laws address] not only solid wastes, but also liquid and . . . semi-solid wastes and sludges.") *reprinted in* 5 U.S. Code Cong. & Admin. News 6240 (1976). Second, improper deposition of solid waste is a leading cause of unsafe water. *Id.* at 5, 6242 ("The existing methods of land disposal [of solid waste] often result in . . . subsurface leachate and surface run-off, which affect air and water quality."); *and see Sierra Club v. U.S. EPA*, 992 F.2d 337, 343-344 (D.C. Cir. 1993). In sum, solid waste facilities are "safe water and hygienic sewage disposal facilities."

Nor do the VSW statutes prohibit a grant recipient from using the grant to pay a lender. On the contrary, Village Safe Water grants may be used for all costs associated with a hygiene project, including "the cost of financing the project." AS 46.07.040(c). Obviously, the legislature is not averse to using VSW funds for interest, loan origination fees, and other costs likely to be paid by Kotzebue if it receives the grant.

None of the pertinent federal statutes proscribe Kotzebue's plan. The purpose of a section 601 grant is to "continue providing assistance for water pollution control activities in perpetuity." 40 C.F.R. • 35.3100(a). That purpose is served if: (1) the funding is used for "water pollution control"; and (2) the funds are repaid. Control of solid wastes prevents non-point source discharges and has been expressly recognized as a technique for controlling water pollution. *See* FWPCA •• 319 and 502(6) (relating to the control of nonpoint source pollution and defining "pollutant" to include •solid wastes•); 53 Fed. Reg. 33,339 (August 30, 1988) (Proposed solid waste rules were designed to coordinate with FWPCA to minimize nonpoint pollution from solid wastes). If Kotzebue secures the VSW grant for the intended purpose, Alaska's revolving fund will most assuredly be repaid. The two purposes are served. There is no federal impediment to Kotzebue's plan.

Finally, we see nothing in the ACWF statute or rules that would prevent Kotzebue from using a VSW grant to repay an ACWF loan. One could argue that 18 AAC 76.030(a)(4) limits the source of Kotzebue's repayment to its user fees because Kotzebue made "a commitment to **use**" (emphasis added) those fees as its "dedicated source[]" of revenue for repayment of the loan." However, DEC has never adopted such a miserly reading of its regulation. The agency's standard operating procedure is to accept repayment of the loans without concern as to whether the repayment comes from the source identified in the application. *Pers. Commun. with Mike Burns, DEC/FC&O, December 13, 1996.* We discern no reason why DEC should depart from that practice in this case. Moreover, the regulation allowed Kotzebue to identify "one **or more** dedicated sources of revenue for repayment." (Emphasis added). 18 AAC 76.030(a)(4). We see no reason why Kotzebue's paperwork could not now be amended to reflect a new and additional source of revenue if it becomes available.

In short, there is no legal impediment to Kotzebue's proposal. We do note that the legislature qualifies each VSW grant with a general statement about its intended purpose. *See, e.g., pp. 56-58, sec. 135, ch. 103, SLA 1995.* If DEC seeks funding on behalf of Kotzebue, we think it incumbent upon the agency to clarify to legislators that the money will be used to retire a debt, not to directly purchase equipment.

CONCLUSION

Kotzebue has applied for a VSW grant which it will use to repay an ACWF loan. While there is no guarantee that Kotzebue will qualify for the grant, or that the grant will be

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legislatively appropriated even if Kotzebue qualifies, nothing prevents Kotzebue from using the VSW money to repay the ACWF loan so long as the legislature is apprised of, and approves of, that intended purpose.

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