

**LETTER OPINION
2004-L-11**

February 9, 2004

The Honorable Roger Johnson
Agriculture Commissioner
600 East Boulevard Avenue, Dept. 602
Bismarck, ND 58505-0020

Dear Commissioner Johnson:

Thank you for your letter asking about the receipt and expenditure of certain federal funds for Project Safe Send. You state that Project Safe Send has been collecting unusable pesticides since the Legislature authorized the project in 1991. The 2003 Legislature reduced the requested appropriation from \$619,525, as included in the Governor's budget, to \$308,870 in the final version of Senate Bill 2009 which was signed into law. You indicate the funding source for Project Safe Send is the Environment and Rangeland Protection Fund and although that fund had sufficient moneys in it to appropriate the requested amount, the lesser amount was ultimately appropriated. You further indicate the Department of Agriculture received preliminary approval to receive \$200,000 in federal funds from the Environmental Protection Agency through the State Health Department for Project Safe Send.

You acknowledge that in order to accept and expend this federal money, approval would be needed from the Emergency Commission and the Legislative Council's Budget Section. See generally N.D.C.C. ch. 54-16. You question whether the Emergency Commission and the Budget Section may authorize the acceptance and expenditure of the federal funds for Project Safe Send.

When an emergency exists, a state officer may present to the Emergency Commission an itemized verified petition requesting approval to "accept and expend federal funds pursuant to section 54-16-04.1."¹ N.D.C.C. § 54-16-03.1. "Emergency" is defined as

¹ I note that your letter cites to N.D.C.C. § 54-16-04.2 regarding authority of the Emergency Commission to authorize acceptance and expenditure of unappropriated funds. However, the applicable statute is actually N.D.C.C. § 54-16-04.1. See N.D.A.G. 96-L-135 ("Federal money may be received and spent under N.D.C.C. § 54-16-04.1. New sources of funds, aside from federal funds, may be received and spent under N.D.C.C.

“either a calamity or an unforeseen happening subsequent to the time the appropriation was made and which was clearly not within the contemplation of the legislative assembly and the governor.” N.D.C.C. § 54-16-00.1(1). I assume for purposes of this letter that the availability of the federal funds was unknown to the Governor and Legislative Assembly when Senate Bill 2009 was being considered.

Section 54-16-04.1 provides in part:

The emergency commission, upon the advice and counsel of the office of management and budget, may authorize the state treasurer to receive any moneys not appropriated by the legislative assembly which are made available by any federal agency and which the legislative assembly has not indicated an intent to reject.

(Emphasis supplied.)

The question is whether the Legislature has indicated an intent to reject the federal funds.² I have reviewed the text of Senate Bill 2009 appropriating moneys for Project Safe Send in the amount of \$308,870, as well as the pertinent legislative history. While there were a number of references in the legislative history to scaling back the program, using the available funds in the Environment and Rangeland Protection Fund for other purposes such as noxious weed eradication, and reestablishing a sunset for Project Safe Send, I found no relevant discussion about the potential use of any federal funds or any indications that federal funds for such a purpose would or should be rejected. See, e.g., Hearing on S.B. 2009 Before the House Comm. on Appropriations, 2003 N.D. Leg. (Mar. 21; Apr. 2) (Statements of Rep. Carlson); Hearing on S.B. 2009 Before the Conf. Comm., 2003 N.D. Leg. (Apr. 10) (Statements of Rep. Carlson, Sen. Bowman); Hearing on S.B. 2009 Before the Conf. Comm., 2003 N.D. Leg. (Apr. 16) (Statements of Sen. Bowman, Rep. Skarphol).

§ 54-16-04.2 ...”). The specific provision in N.D.C.C. § 54-16-04.2 which you were questioning permits the Emergency Commission with approval of the Budget Section to receive moneys “if the legislative assembly has not indicated an intent to reject the moneys or the program.” A similar although somewhat less stringent provision appears in N.D.C.C. § 54-16-04.1, as further explained.

² As is apparent, N.D.C.C. § 54-16-04.1 (which is applicable in this instance since federal funds are involved) does not condition the receipt and expenditure of federal funds to a finding that the Legislative Assembly has not rejected “the program” as that provision appears in N.D.C.C. § 54-16-04.2. Thus, it is not necessary to examine whether the Legislature has in some manner indicated an intent to reject the program.

“The question of whether the Legislative Assembly has indicated an intent to reject certain federal funds is in the nature of a question of fact as well as question of law. We do not presume to substitute our judgment in the matter for that of the Emergency Commission since the legislature has delegated this responsibility to the Emergency Commission.” N.D.A.G. Letter to Governor Link (May 4, 1973). Thus, while it is up to the Emergency Commission to determine whether the Legislature has indicated an intent to reject federal funds for Project Safe Send, given the fact that there is no language in the text of Senate Bill 2009 nor in the pertinent legislative history to demonstrate a legislative intent to reject federal funds for Project Safe Send, the record of the Legislature “is, in our estimation, conclusive and leaves little discretion for the Emergency Commission to exercise.” Id. See also State v. Cox, 532 N.W.2d 384, 387 (N.D. 1995) (when the facts are not in dispute, the matter may be resolved as a question of law).

Given these facts, it is my opinion that the Legislative Assembly has not indicated an attempt to reject federal funding for Project Safe Send and, pursuant to N.D.C.C. § 54-16-04.1, the Emergency Commission with the approval of the Budget Section “may authorize any state officer to receive and expend [the] federal moneys from the date such moneys become available until June thirtieth following the next regular legislative session.” N.D.C.C. § 54-16-04.1.

Sincerely,

Wayne Stenehjem
Attorney General

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