MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

REASON AS TO QUESTION NO. 1:

32 M.R.S.A. §.1658, subsection 3 provides as follows:
"As used in this chapter, unless the context requires otherwise:

. . . . .

"3. Hearing aid. 'Hearing aid' shall mean any wearable instrument or device designed for or offered for the purpose of aiding or compensating for impaired human hearing, and any parts, attachments or accessories, including earmold, but excluding batteries and cords . . . ."

The above quoted subsection defines auditory instruments subject to control under 32 M.R.S.A. Chapter 23 A and makes specific reference to "wearable" instruments. It is our opinion that group auditory amplification equipment such as that provided for use in classrooms in the Governor Baxter State School for the Deaf, although the receiver thereof may be temporarily worn on the person during classroom session, falls outside the purview of Chapter 23 A and is thus, not subject to its provision. Instruments intended to be controlled by Chapter 23 A are the personal hearing aids individually fitted to specification and individually worn by the owner and carried entirely upon the person. Furthermore, the provision of such group auditory amplification equipment for the use of deaf students in the classroom can not be said to be fitting and dealing in hearing aids within the contemplation of 32 M.R.S.A. Chapter 23 A, the practices subject to control thereunder.

REASON AS TO QUESTION NO. 2:

Batteries and cords are specifically excluded from the definition of hearing aids which includes other accessories. It is, therefore, our opinion that batteries and cords may continue to be sold to the Governor Baxter State School students at cost, but that any other accessories not specifically excluded are required to be sold by a dealer licensed under 32 M.R.S.A. Chapter 23 A. The purchase by any student of any such other accessories shall only be from a licensed dealer.

COURTLAND D. PERRY
Assistant Attorney General

December 10, 1969
Environmental Improvement
Commission

George C. Gromley, Supervision Engineer

Pollution Abatement Facility Planning Grants

SYLLABUS:

1. The vote to proceed with a pollution abatement construction program, which is a prerequisite under 38 M.R.S.A. § 411, sub- §·3, as amended, to a planning grant, must include a vote to raise the local share of the construction cost.

2. The 30% planning grant referred to in 38 M.R.S.A. § 411, sub- § 3, as amended, does not apply to "sewage surveys" mentioned in 38 M.R.S.A. § 412.

3. There is no statutory requirement that plans eligible for grants under 38 M.R.S.A. § 411, sub- §·3 receive federal approval before the state grant may be made.

FACTS:

You have asked eight questions relating to Me. Public Laws 1969, c. 499, which in Sections 5 through 8 amended 38 M.R.S.A. § 411, the statute relating to State grants for pollution abatement facilities. These questions will be answered in the order in which they were posed.

QUESTION NO. 1:

Section 8 of the reference Public Law in substance provides that the Commission may grant up to 30% of the cost of planning municipal and quasi-municipal pollution abatement construction programs after the governing body of the municipality or quasi-municipal corporation duly votes to proceed with a pollution abatement construction program. Must this local vote include an affirmative vote to raise the local share of the construction cost?

ANSWER NO. 1:

Yes. The legislature appears to have intended that the EIC be assured that the funds which it advances will be supplemented by the local share and that the needed facility for which the funds are advanced will in fact be built. Only a vote to raise the local share of the construction cost can provide such assurance.

QUESTION NO. 2:

Does the 30% grant referred to in Section 8 of the reference Public Law apply to "sewage surveys" as described in 38 M.R.S.A. § 412, as well as detailed planning and engineering costs which are an essential prerequisite to actual construction?

ANSWER NO. 2:

No. 38 M.R.S.A. § 411 is closely linked to the Federal Water Pollution Control Act, 33 USCA § § 466 through 466k, which provides for federal grants to states in aid of pollution abatement efforts. The relevant portion of the federal statute, for our purposes, reads:

> "The Secretary is authorized to make grants to any State . . . for the *construction* of necessary treatment works . . . and for the purposes of *reports, plans and specifications* in connection therewith." 33 USCA § 466e (a) (Emphasis Supplied)

38 M.R.S.A. § 411 and the federal law must be read together in order to accomplish their common purpose. Both statutes contemplate as eligible for grants only detailed planning and engineering costs which form an essential prerequisite to the construction program, and, in the case of the state law, these costs are not eligible for grant monies until after the governing body of the municipality or quasi-municipal corporation duly votes to proceed with a pollution abatement construction program. Pilot plants, feasibility studies, cost estimates and the like, designed to aid such governing body in reaching the decision on whether or not to embark on such a program may be subsidizable by the EIC as "sewage surveys" under and subject to the limitations of 38 M.R.S.A. § 412.

QUESTION NO. 3:

Planning a pollution abatement facility often includes work not considered eligible for the EIC for construction aid. In determining the state's 30% share to be paid to a municipality or quasi-municipal corporation for expenses incurred in planning a pollution abatement construction program under 38 M.R.S.A. § 411(3), should the EIC limit such amount to the cost of items eligible for construction aid?

ANSWER NO. 3:

Determination of the costs eligible for payment under 38 M.R.S.A. § 411(3) is an administrative decision to be made by the EIC. The statute authorizes payment

> " . . . not in excess of 30% of the expense of a municipality or quasi-municipal corporation incurred by it in *planning* a pollution abatement construction program." (Emphasis Supplied)

The question of what constitutes planning costs is peculiarly within the expertise of the EIC to determine, and is a question of fact for administrative decision, rather than one of law for resolution by this office.

Reference should be had to Answer 2, *supra,* concerning the distinction made in Sections 411 and 412 between detailed planning and engineering costs forming an essential prerequisite to the construction program (which are eligible for reimbursement under section 411) and preliminary feasibility studies and the like (which are not eligible for reimbursement under § 411, but may be eligible under section 412).

QUESTION NO. 4:

The federal government makes its own determination of what costs, incurred in planning or constructing a pollution abatement facility, are eligible for federal aid. Often such determination is not made until after completion of final plans. In determining the amount to be paid to a municipality or quasi-municipal corporation under the provisions of 38 M.R.S.A. § 411(2), permitting pre-financing by the EIC of a portion of the federal share of the cost of a pollution abatement construction, may the EIC rely upon existing guidelines and its past experience concerning federal eligibility requirements?

ANSWER NO. 4:

The decision of whether or not to so proceed is administrative in nature and raises no issues of law. However, the EIC should require that, in any event any costs of a program, for which the EIC prefinances the federal share, are later determined by the federal government to be ineligible for federal aid, the municipality or quasi-municipal corporation will reimburse the Environmental Improvement Commission for such ineligible costs. The statute provides for prefinancing "in anticipation of federal reimbursement . . . " for the amount prefinanced. We interpret the statute to mean *full* repayment of such amount, and to require that the EIC prefinance no more than it will eventually receive from the federal government. In view of the uncertainties concerning the method of determining the eventual amount of the federal share, the EIC must be assured that its pay-outs under the statute will not exceed the future income from the federal government.

QUESTION NO. 5:

Consulting engineers base their design fees on a percentage of final construction costs. May the EIC, in determining the amount to be paid to a municipality or quasi-municipal corporation under either the direct planning grants statute, 38 M.R.S.A. § 411(3), or the prefinancing statute, 38 M.R.S.A. § 411 (2), use estimated engineering costs with adjustments after final engineering costs are known?

ANSWER NO. 5:

Such a determination lies wholly within the administrative discretion of the EIC. However, we would caution, as we did in our answer to Question No. 4, that the EIC should require reimbursement by the municipality or quasi-municipal corporation of any monies paid by the EIC which are later determined to have been in excess of those actually required to be paid by the municipality or quasi-municipal corporation as planning or construction costs.

QUESTION NO. 6:

38 M.R.S.A. § 411(3) authorizes the EIC to make direct grants in an amount not in excess of 30% of the expenses of a municipality or quasi-municipal corporation in planning a pollution abatement construction program. Must the plans receive federal approval before the EIC may make the grant?

ANSWER NO. 6:

No. We find no such requirement, either expressly or by implication, in this section.

QUESTION NO. 7:

38 M.R.S.A. § 411(2) authorizes the EIC to make payments not in excess of 30% of the expense of

> " . . . . pollution abatement construction programs which have received federal approval, or for planning such programs, in anticipation of federal reimbursement from federal programs of such amounts . . . "

a. Does this section authorize the EIC to make such a payment in anticipation of future federal reimbursement, for planning?

b. Is federal approval of the program necessary before the EIC may make the payment for planning such program?

c. What constitutes federal approval?

ANSWER NO. 7:

a. Yes. The statute speaks for itself in this regard.

b. No. Obviously a program cannot receive federal approval until it has been adequately planned. To interpret the statute to mean that the program must be approved before it is planned would be anomalous.

c. This question is a matter for administrative determination by the EIC, based on its relationship and experience with the federal government. It may be that the federal

statute defines the criteria for approval. In any event, your question raises no issue of state law cognizable by this office.

QUESTION NO. 8:

Me. Public Laws 1969, c. 499, § 6 states in part:

> " . . . [W]hen the Legislature is not in session, the Governor and Council may authorize the commission to advance planning funds authorized by subsections 2 and 3, not in excess of $50,000 to any one municipality or quasi-municipal corporation."

Does this language mean that under subsection 2, $50,000 could be advanced, and an additional $50,000 could likewise be advanced under subsection 3?

ANSWER NO. 8:

We decline to answer Question No. 8 because it does not appear from the statute that an answer would in any way be of assistance to the EIC in performing its statutory duties. The authorization to the EIC to make the advance would come from the Governor and Council. They would be the only parties called upon to decide the question you have asked.

CROSS REFERENCES

Eligible planning costs, see opinion dated December 12, 1968.

Grants for unspecified "planning" not authorized, see opinion dated October 3, 1968.

ROBERT G. FULLER, JR.
Assistant Attorney General

December 16, 1969
Education

William T. Logan, Jr., Commissioner

SYLLABUS:

The State Board of Education has no jurisdiction or control over the State Principals' Association.

FACTS:

The State Principals' Association is a nonstock corporation organized February 21, 1952 under what is now 13 M.R.S.A. §§ 901-986. The purposes set forth in the certificate of organization, which has not been amended, read as follows:

> "To promote the best interests of the secondary schools of Maine; to encourage cooperation, professional efficiency and good fellowship among its members; and to regulate all interscholastic activities in secondary schools."

Apparently prior to 1952 there was an unincorporated association. From 1921 to 1967 a member of the Department of Education served as Executive Secretary. Since 1967 the Association has paid for a full-time Executive Secretary.

It is fair to state that the Department of Education exercises no control over the Association. It is common knowledge that the Association is concerned with so-called