

MAINE STATE LEGISLATURE

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STATE OF MAINE

July 9

Inter-Departmental Memorandum Date ~~May 24~~, 1974

To William R. Adams, Commissioner

Dept. Environmental Protection

From Donald G. Alexander, Assistant

Dept. Attorney General

Subject Use of Coastal Protection Fund (38 M.R.S.A. § 551) for Disposal of Spill Clean-up Materials

Your memo of May 16, 1974, on the above captioned subject posed two questions:

1. Can Coastal Conveyance Funds be used for the purchase of an oil spill waste disposal site and equipment necessary to operate such site?

Answer: Yes.

Discussion: The third sentence of Section 551 states in part ". . . to this fund shall be charged any and all expenses of the commission related to this subchapter, including administrative expenses, costs of removal of discharges of pollutants, and third party damages. . . ." The second sentence of the first paragraph of § 548 gives the Department authority to assume responsibility for removal of oil spills. Spill waste disposal sites would be necessary elements of such clean-up activities activities. As such sites are necessary elements of abatement activities, specific authority to use funds for the purpose is provided in section 551(5)(B).

Undertaking such activities must, however, be done with caution as they might be construed as activities of a proprietary nature, or might otherwise be construed to constitute a waiver of the defense of sovereign immunity and thus subject the State to substantial damage claims in cases of negligent performance resulting in damages.

2. If the answer to question one is affirmative, does the Department of Environmental Protection have authority to use eminent domain powers to acquire such a site?

Answer: No.

Discussion: Chapter 544 of the 1971 Public Laws repealed a general grant of authority to the Governor and Council to approve takings by eminent domain. Previously the Court had severely limited the scope of the general grant, Smith v. Speers, Me., 253 A.2d 701 (1969). That case holds that though the eminent domain power is vested in the legislature, it may be delegated but only for certain defined public purposes. The case also indicates that a power to purchase or lease lands does not by implication include the power of eminent domain, and that this power must be specifically stated to exist. As such specific power is not stated either in the Coastal Conveyance laws (38 M.R.S.A. § 541-557) or in the general enabling legislation for the Department (38 M.R.S.A. §§ 341 and 342) eminent domain authority is not available.

AN INFORMAL OPINION

Donald G. Alexander
DONALD G. ALEXANDER
Assistant Attorney General