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REC.
STATE OF NEBRASKA
OFFICIAL
SEP 21 1992
DEPT. OF JUSTICE

DATE: September 15, 1992

SUBJECT: Funding for Local Monitoring Committee

REQUESTED BY: Randolph Wood, Director
Department of Environmental Quality

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have inquired regarding funding sources for the Boyd County Local Monitoring Committee. The Local Monitoring Committee was created pursuant to the Low-Level Radioactive Waste Disposal Act under Neb.Rev.Stat. § 81-15,101.01 (1991 Supp.). The statutory purpose for the Boyd County Local Monitoring Committee is to provide significant input concerning local needs and resources regarding all relevant aspects of the construction, operation, monitoring, closure, and custodial care of the facility.

The Boyd County Local Monitoring Committee receives funds which are collected by the Department from fees or surcharges received pursuant to Neb.Rev.Stat. § 81-15,104 (1990 Cum.Supp.). These fees and surcharges collected for use by the Local Monitoring Committee are not to exceed $100,000 per year.

You have identified two possible sources of alternate funding and inquired specifically regarding these funds and their availability for the Boyd County Local Monitoring Committee to conduct a public hearing. The letter from the Chairman of the Boyd County Local Monitoring Committee which accompanied your letter states that the purpose of the public hearing "shall be, but not limited to, a needs assessment of the community as mandated by Chapter 11 concerning but not limited to environmental protection, resource protection and local resources. . . ."

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You first ask whether Community Improvement Cash Funds may be used as a funding source for the Local Monitoring Committee. Neb.Rev.Stat. § 81-15,113.01 (1990 Cum.Supp.) creates the Community Improvement Cash Fund. This statute provides at subsection (b) that "[a]fter the final site has been selected and until the facility is operational, three hundred thousand dollars per year shall be allocated for public purposes as provided in subsection (3) of this section. . . ." Subsection (3) provides that the money shall be allocated 50 percent to be distributed to incorporated municipalities which lie totally or partially within ten kilometers of the facility or the proposed facility and 50 percent to the county treasurer of the county where the facility is located or proposed to be located.

This statute limits how the funds shall be distributed by use of the word "shall." "Shall," in statutes, is ordinarily construed as mandatory, particularly when the statute is addressed to public officials. State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N.W.2d 297 (1950). See also State v. Stratton, 220 Neb. 854, 374 N.W.2d 31 (1985). Therefore, the Department of Environmental Quality has no discretion on the distribution of these funds. They must be distributed to the municipalities and the county as set out in the statute. However, the statute does not limit how the municipalities or the county may use these funds. The county or the municipalities to whom the funds are statutorily allocated could fund the project for which the Local Monitoring Committee is seeking monies. The Local Monitoring Committee would have to approach these entities regarding the use of these funds.

The second source of funding mentioned in your letter would be rebate funds through the Central Interstate Low-Level Radioactive Waste Commission (Commission). These funds are made available to the Commission by the United States Department of Energy in accordance with the Low-Level Radioactive Waste Policy Amendment Act of 1985. The Commission subsequently makes the funds available to any party state in the process of becoming a host state.

Rule 4.2 of the bylaws of the Commission states:

> Any member state receiving funds from the Commission pursuant to this Rule, shall use such funds only for the purposes associated with locating and licensing a regional waste management facility and/or a regional waste minimization program. Such use of funds may include but not be limited to the conduct of geological and technical studies relating to the siting of such a facility, the employment of technical staff and/or contractors for the purpose of reviewing a license application, a public outreach program related to the

location of such a facility and those tasks associated with the review of a license application.

The state receiving such funds is accountable to the Commission for all funds received. Any member of the Commission may challenge the legitimacy of any funds expended. If the Commission finds that an expenditure of funds is not legitimate, the Commission may rule that the state must repay the funds.

If there is any question as to whether a specific project would fit within the general area for which these funds are provided, it would seem logical to request a determination from the Commission itself since the Commission must rule on the legitimacy of any expenditures. A Commission approval for a project would not be a blanket approval for all expenditures later incurred. The Commission could still challenge the legitimacy of expenditures made and whether they were necessary and appropriate to accomplish the ends of the project.

Since the Commission provides the funds to the state, the state retains its liability to the Commission for expenditure of those funds. If the state seeks to provide those funds to a third party for accomplishing specific goals, appropriate legal documents should be utilized specifying that the third party would be liable to the state for any expenditures made by them and later determined improper by the Commission.

It is our determination that if the Local Monitoring Committee wishes to seek funds under the Community Improvement Cash Fund they must petition the communities or the county that statutorily receive these funds but that the Department may not give Community Improvement Cash Funds directly to the Local Monitoring Committee. If rebate funds are sought through the state, it would be advisable to receive a determination from the Commission regarding funding of such a project and to obtain guarantees from the Local Monitoring Committee to repay any funds which the Commission may later determine were not legitimately spent for the project.

Sincerely,

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28-03-14.92
APPROVED:

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