provision to the Department of Public Welfare by chapter 46 of the Acts of 1939 does not contain the inter-departmental budgets of the Public Welfare Department. The provisions already referred to of the several Appropriation Acts, beginning with 1933, seem to contemplate cases where the Appropriation Act itself has placed a specific appropriation to the credit of a division which thereafter was transferred. Section 60-303 is not so limited, it apparently being contemplated that the Department of Treasury in making the assignment would determine the proportion of the total appropriation which should go with the transfer. It would appear that section 60-303, supra, contains sufficient authority for the transfer contemplated by your question as limited by the discussion in the early part of the opinion, and I so hold.

HIGHWAY COMMISSION, STATE: Authority to enter into contract with beet sugar refining plant through whose land proposed highway will run to save harmless from future liability for maintenance of public nuisance.

August 11, 1939.

Hon. T. A. Dicus,
Chairman, State Highway Commission,
State House Annex,
Indianapolis, Indiana.

Dear Mr. Dicus:

I received your letter of August 9, in which you ask for an official opinion as to whether or not the State can legally make such an agreement as proposed in the letter. The letter is as follows:

"The State Highway Commission of Indiana has under consideration the reconstruction of State Road No. 27 through Adams County, Indiana. There is located on the proposed route the plant of the Central Sugar Company of Decatur, Indiana, which is the owner of a large tract of land through which the proposed road extends.

"The Central Sugar Company refines sugar from a beet which is known as the sugar beet. In the process of sugar refining, there is a certain pulp, or pumice, which must be disposed of by the refiners. This pulp
is now being deposited on a part of the land owned by the refinery which is very low and swampy, a considerable distance from the city of Decatur, and away from the line of the highway as now constructed; in fact, it is entirely out of sight of the general public. The purpose of having this pulp deposited in such an out-of-the-way and obscure place is because of the fact that, at a certain stage of its decomposition, it gives off an offensive odor.

"The reconstruction of State Road No. 27 as proposed by the State Highway Commission will be in very close proximity to that part of the real estate of the Central Sugar Company where this pulp is now being deposited and will bring the public in close contact with the pulp and the odor emanating therefrom.

"The State Highway Commission is able to agree with the Central Sugar Company as to every item of damage that will result to them by the construction of the highway as proposed, and the Central Sugar Company is willing to, for the consideration agreed upon, convey by grant the right of way necessary for the reconstruction of the highway, except the possibility that, at some future time, it will be necessary for them, on account of the odor from the pulp so deposited, to reestablish that part of their plant. This is the damage which the State Highway Commission and the Central Sugar Company cannot agree upon.

"The Central Sugar Company has made a proposition to the State to accept the amount of money offered for the right of way, provided the State will insert a clause in the grant to save them harmless and to protect them in case there comes a time when they will be required by law to reestablish the place for the deposit of the pulp, this provision to be limited to ten years from date of execution. In other words, should a suit be brought within ten years from date to declare the place a nuisance because of the odor, then the State would be required to indemnify and save harmless the Central Sugar Company by reason of such action, and in case the judgment of the court should declare it a nuisance and require it to be reestablished, the State would then pay whatever it would cost to make such readjustments of the plant."
"The State Highway Commission respectfully asks that you render an official opinion on the question involved herein and determine whether or not, under the law, the State can enter into such an agreement and stipulation in a right of way grant."

In my judgment such an agreement can not be legally made. In the first place, it is against public policy for the State to enter into a contract whereby at some future time (ten years) it is to be held liable in damages in a contemplated suit. Secondly, if such a suit were instituted, the State might be the plaintiff and such an agreement to pay for readjustments would, in effect, amount to the State agreeing to pay a fine of one convicted of maintaining a nuisance. A public nuisance is punishable by fine. Sec. 10-2501; Sec. 10-2502, Burns Indiana Statutes, 1933. Thirdly, under Sec. 2-505, Burns 1933 Statutes, whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property is a nuisance and the subject of an action and damages may be recoverable by any person injured.

Such a contract as proposed would enter the field of speculative damages to such an extent that this alone, in my judgment, would make it illegal. The company might be sued by an individual for damages done him, and it might be prosecuted by the State of Indiana for maintaining a nuisance whereby the State Highway Commission would be helpless to prevent the prosecution. Moreover, under such an agreement the State would be placed in the position of agreeing to pay for a possible tort action for which it is never liable in the absence of a statute.

PUBLIC SERVICE COMMISSION: Jurisdiction to approve conveyance of not used and useful property by public utility.

August 11, 1939.

Hon. William A. Stuckey, Commissioner,
Division of Public Service Commission,
Indianapolis, Indiana,

Dear Sir:

I have before me your request for an official opinion as to the jurisdiction of the commission in view of the provisions