

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date March 30, 1973

To Charles H. King Dept. Environmental Protection  
From John M. R. Paterson, Assistant <sup>JP</sup> Dept. Attorney General  
Subject Proposed Revision of Water Quality Standards

**NOT A FORMAL OPINION**

FACTS:

Your memo of February 21, 1973, requests guidance as to whether the Board may by regulation define levels of particular pollutants permissible in the waters of the State and the methods for calculating and measuring water quality. Attached to your memo is a letter from Walter Newman of the E.P.A. Water Quality Branch with proposed regulations.

E.P.A. proposes several types of regulations dealing with the following general subjects:

- (1) Specific standards to expand upon descriptive water quality criteria as found in 38 M.R.S.A. §§ 363 and 364.
- (2) Standards defining the maximum permissible mixing zones and minimum zones of passage.
- (3) Procedures for sampling and testing water quality.
- (4) Exceptions regarding applicability of water quality standards during drought conditions.

QUESTION:

May the Board enact such standards by regulation?

ANSWER:

Yes, but with the qualifications noted below.

REASONING:

1. The first category of proposed standards involves the statutory water quality standards. Those standards are found in 38 M.R.S.A. §§ 363 and 364. With the exception of specific values on dissolved oxygen, Ph, and bacteria, those sections define the water classifications in descriptive terms, e.g., "suitable for water contact recreation," "no interference with propagation of fish," "no chemical constituents which are harmful to humans, animals or aquatic life." The cited sections do not delineate precise amounts or types of substances which will be deemed to be compatible with these descriptive standards.

It is an elementary principle of administrative law that an agency may interpret the statutes it must administer and enforce.<sup>1/</sup> Such interpretations are valid so long as they do not conflict with or extend the statutory powers of the agency. In addition to this inherent power, the Maine statutes specifically provide that:

"The Board may in accordance with the Administrative Code and after public hearing, adopt, amend and repeal such reasonable rules and regulations as it deems necessary to carry out this Title or any other laws which it is charged with the duty of administering." 38 M.R.S.A. § 361.

Such provision appears to grant to the Board the power to adopt legislative rules, i.e., rules with the force of law, so long as such rules are adopted pursuant to and consistent with the statutes and necessary constitutional principles.

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<sup>1/</sup> Cooper, State Administrative Law, 174-175 (1965).

**NOT A FORMAL OPINION**

Whether or not particular legislative or interpretative rules are valid depends upon the facts in each particular case. For example, it would appear on its face that a regulation defining permissible phenol in Class A waters is valid provided that the value chosen was related to the uses protected in such waters. Conversely, however, the Board does not have the authority to change the dissolved oxygen criteria from that which appears in the statutes. Any change in that criteria must be through legislation.

2. The proposals for guidelines in establishing mixing zones and zones of passage (¶ 4 and 5 on page 2 of letter from Walter Newman) represent a somewhat more complex problem. It appears that E.P.A. is proposing guidelines to be used in establishing such zones. Section 451 of the Maine statutes provides that each mixing zone is to be established after an evaluation of the unique natural conditions in the receiving body of water. Unlike the above discussion involving water quality standards, the mixing zone concept is not as susceptible of absolute regulatory interpretation. I assume, from reading the language of the E.P.A. proposals that they do not propose inflexible standards.

The preceding discussion regarding interpretative rules is also equally applicable to this issue. The Board may by regulation interpret and establish general guidelines to be used in establishing such zones. Since, however, § 451 contemplates some flexibility, the Board should be cautious in formulating any interpretation which would amount to an absolute standard to be applied to all bodies of water.

3. E.P.A. proposes that D.E.P. adopt uniform sampling, testing and bioassay procedures for all water quality monitoring. Such a proposal is entirely permissible and is consistent with the language in 38 M.R.S.A. §§ 414(2), 414(3) and 452. In addition, the Board could require uniform analytical methods to be employed by all applicants for licenses under § 414(1). In formulating such procedures, the Department must keep in mind that such procedures must not be oppressive. A particular type of sampling program suitable for Maine Yankee would be inappropriate for a single family discharge. Any regulations should, of course, contain appropriate provisions to insure that they reasonably fit the circumstances of each individual case.

4. Finally, E.P.A. proposes that the State water quality standards "apply at all times except during periods when flows are less than the average minimum seven day low flow which occurs once in ten years." Though this proposal is ambiguous, I assume that it means that during such low flow conditions, the statutorily defined classification standards do not apply and some other, presumably more rigorous, standard would be effective. Such a provision is inconsistent with §§ 363 and 364 which define water quality without regard to flow conditions. The state classification standards apply at all times. The Board does not have the authority to change or alter those standards during low flow. In order to implement the proposal of E.P.A., a statutory amendment is required.

If, however, E.P.A. means to say that during low flow conditions less wastes can be discharged because of the decreased size and assimilative capacity of the receiving body, such requirement is

NOT A FORMAL OPINION

both reasonable and legally permissible. The Board could achieve such a result either by the adoption of general interpretative regulations or imposition of special conditions on licenses.

Adoption of any of the above regulations must be in the manner prescribed by § 361 and 5 M.R.S.A. §§ 2351-2354. Consistent with our past policy, this would include (1) preparation of draft regulations; (2) 30-day public notice with summary of substance of the proposed regulations and statement of availability; and (3) public hearing.

Since the specific regulatory provisions have not all been drafted as of this date, I must reserve judgment on the substance of such regulations. As regulations are prepared, I will be pleased to offer assistance to you.

JMRP/ec

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