STATE OF MAINE

Inter-Departmental Memorandum Date April 30, 1974

To William R. Adams, Jr., Commissioner Dept. Environmental Protection

From Donald G. Alexander, Assistant Dept. Attorney General

Subject Questions Submitted by the Board Regarding Conditions Subsequent on Grant Approvals.

At its April 10th meeting, the Board propounded to the Department of the Attorney General three questions relating to attachment of conditions subsequent to grant applications.

QUESTION:

1. Can the Board approve Site Location applications subject to subsequent proof of financial capacity?

ANSWER:

No. The Board can only approve an application after it has determined that the applicant has provided some proof of sufficient financial capacity to meet environmental standards. (See discussion below).

QUESTION:

2. Can the Board approve any license with post approval conditions- is there a basis for distinction among conditions?

ANSWER:

The Board cannot approve an application unless it finds that the applicant has sustained the burden of proof of demonstrating to the Board that he has met or will meet all statutorily specified pre-conditions of approval. However, if the Board finds, in the record of the proceeding, any evidence of probative value that the applicant can meet or will meet a specified condition of approval, it may find that the applicant has satisfied his burden of proof as to that condition if there is no contrary evidence. Where there is contrary evidence, the Board may not approve an application unless it can reasonably determine that the weight of the evidence supports a finding that the necessary precondition has been or will be met.

DISCUSSION:

The Site Location Law, 38 M.R.S.A. § 484(1) provides that: "The commission shall approve a development proposal whenever it finds that: the developer has the financial capacity, etc." As the burden of proof of financial capacity or any other requirement is on the applicant in such an administrative proceeding, Cooper, State Administrative Law, p. 355; 2 Am.Jur.2d, Administrative Law, 391, it would appear that the Board could not rightly approve an application which had not provided some proof of financial capacity. It has been held that where a statutorily specified prerequisite for approval is not provided, the only option of an administrative agency is to deny the application, Cameron v. Knight, R.I., 268 A.2d 431 (1970).

AN INFORMAL OPINION

However, if, in the record of the proceeding, there is some evidence of probative value that the applicant has or will have financial capacity, this may be a sufficient basis for approval, 2 Am. Jur.2d, Administrative Law, 393, unless there is countervailing proof presented by an opposing party; then the Board must be able to reasonably find that the weight of the evidence supports such a finding.

The same rule would apply to determinations which relate to other prerequisites for approval specified by law.

QUESTION:

3. Can the Board grant permits where the conditions of those permits can be met only by later development of technology?

ANSWER:

The Board cannot grant permits where compliance with the permit is based on a specific technology unless it determines that the technology to achieve the objectives of the permit will be available to the applicant when operations under the permit are commenced.

DISCUSSION:

The three laws under which the Board is most likely to face technological decisions relate to water pollution, 38 M.R.S.A. § 361-A et seq., site location, 38 M.R.S.A. § 481, et seq. and air pollution, 38 M.R.S.A. § 581 et seq. The air and water pollution laws both specify that determinations as to best available technology be made with reference to "the then existing state of technology," effectiveness of control alternatives and economic factors (38 M.R.S.A. § 414-A-1-D and § 582-5-A). The site law requires that before the Board approves an application it determine that the applicant has the "financial capacity and technical ability" to meet pollution standards (38 M.R.S.A. § 484-1). Each of these statutes appear to require that Board determinations be made on the basis of technology which is in existence, not that which is a matter of speculation.

It is recognized that the determination of what is "in existence" can pose difficulties when applied to industrial facilities which generally require construction of specialized control equipment dealing with the unique conditions of the particular facility. In this case, the experience of similar industrial facilities and/or different industrial facilities using control systems similar to that being considered for the applicant's facility should be examined in making determinations as to the existence of technology. After a review of these factors, the Board may find that a particular technology is reasonably likely to be available for a particular proposed facility when that facility is completed and in operation.

If the Board should rely on a predicted but not an "in existence" technology, it may compromise enforcement of environmental standards if the predicted technology is not achieved. "Claims [of technical infeasibility] can be asserted as a defense in either federal or state enforcement proceedings." Buckeye Power v. E.P.A., __F.2d__, 5 ERC 1611 (1973), and such claims have been upheld. Commonwealth v. United States Steel, Pa., 5 ERC 1565 (1973); Pennsylvania v. Pennsylvania Power, Pa., 6 ERC 1328 (1974).

The statues provide, however, that the technological option is only one of several options by which environmental goals may be achieved. (For example, the reduction in sulfur emissions from a power plan may be achieved by technology to reduce stack gas emissions, a change in the fuel for the power plant, or a change in the rate of production or other processes of the power plant when necessary to meet air quality goals.) With these control alternatives the Board may adopt standards which are stricter than those based on a specific technology. By use of this option, development of new technology can be encouraged.

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