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Inter-Departmental Memorandum Date September 26, 1974

To George C. Gormley Dept. Environmental Protection

From Donald G. Alexander, Assistant Dept. Attorney General

Subject Interpretation of 38 M.R S.A. § 451-A

Your memo of July 24, 1974, attached hereto, poses several questions.

Questions:

Case 1: An industry and a municipality have been planning for several years to construct joint waste treatment facilities. The industry presently is not physically connected in any way to an existing system and if and when connected, will contribute a sizeable portion of the flow entering the joint treatment facilities. The industry and the town have met all interim steps of their respective statutory time schedules including that of entering into formal contractual agreements. The municipality applied for but has not received Federal and State grants to proceed to constructing the municipal facilities. They, therefore, have applied for a waiver under the provisions of Section 451-A of Title 38.

Can a waiver be granted to the municipality, and if so, will this waiver include protection for the industry on the basis that they are a customer of the municipal system? Yes, the municipality may be granted a waiver. No, the waiver cannot exempt from the law industries which are planning to tie into the municipal system where the municipal plant will not be operating by October 1, 1976.

Case 2: The circumstances in this case are similar to those above except although the industry and the municipality have been negotiating for many years, they have not entered into a formal contractual agreement. In addition, neither the industry not the municipality have met all the steps of the statutory time schedules that precede the start of construction.

If the industry and the municipality now sign contractual agreements, and in addition within a short period of time satisfy, except for being late, all of the requirements of the statutory time schedules, could the municipality then apply for a waiver and would the industry in this case be covered by any waiver granted the municipality? Answer is same as above.

Discussion of Cases 1 and 2:

The law (38 M.R.S.A. § 414-A) is quite specific in requiring that all discharges "existing on the effective date of this Act" (October 3, 1973) achieve a standard of "best practicable treatment" (BPT) by October 1, 1976. Section 414-A-2 authorizes D.E.P. to establish compliance schedules for individual discharges existing on the effective date of the law. Section 451-A permits granting of variances from those compliance schedules only to municipalities. Thus where an industry is maintaining a discharge on October 1, 1976, that discharge must meet BPT. The fact that an industry has entered into a contract with a municipality where the municipality will provide required treatment at some date after October 1, 1976, does not waive this requirement.

Similarly, the 1976 deadline or other requirements of law cannot be avoided by an industry connecting to the municipal sewer system after October 3, 1973, (the effective date of § 451-A and the date from which "existing" discharges are to be regulated under § 414-A) where the municipality has an untreated discharge and the required standards of treatment for the municipal discharge will not be met by October 1, 1976. The law (Section 413-1) regulates both direct and indirect discharges, and thus such indirect industrial discharges. A clear distinction between "municipal" and "industrial" discharges and regulation based on the source of the pollution, not on who owns the pipe entering the waterway, is well established in the history of Maine's water quality program as indicated in the two prior opinions of this Office attached hereto. The policy reasons for this distinction are adequately articulated in those prior opinions.

It is recognized that this result causes some inefficiencies requiring industries to build treatment plants separately where they might otherwise have combined with municipalities. However, a literal reading of the statute requires this result, and such a result supports the prime policy goal of the law, to secure the expeditious cleanup of the State's waters. The result also assures that industries which spend funds to install individual treatment works to meet the 1976 deadline are not placed at a competetive disadvantage to industries which would be excused from the deadline if they were covered by the municipal variance.

Case 3: In this case an industry which could be anywhere from producing a minor flow to very substantial flows is located in the midst of the municipality and has historically been a paying customer of a municipal sewerage system. The municipality has met all of its statutory obligations relative to time schedules except that of start of construction which has been delayed solely because of the lack of Federal and State grant monies.

Would the industry in this particular situation be protected by any particular waiver that might be granted to the municipality? Generally an industry will be protected, but particular facts may apply which may cause an industry not to be covered even when discharging through a nominally municipal pipe.

Discussion of Case 3:

Generally industries which were connected to municipal sewers on or before October 3, 1973, would appear to be covered by section 451-A, as the "discharge" existing on October 3, 1973, was at least nominally "municipal." Even in this case, however, there may be instances where the municipal variance procedures will not protect an industrial discharger. Such a determination would depend upon the facts in each case and cannot be made prospectively in a legal opinion. Factors to be considered in evaluating such a discharge might include:

- Is the discharge more industrial or municipal (is the effluent from the pipe more than 50% industrial)?

- Is the discharge of such a nature that it could be processed in a municipal plant, or would it require pretreatment by the industry?

- Is the industrial operation one which normally discharges into municipal systems where they are available?

- Is the discharging facility within a category specified in Section 306(b) of the Federal Water Pollution Control Act (PL 92-500) (which lists 27 categories of major polluting facilities)?

- What is the effect of the industrial discharge through the municipal system upon the receiving waters?

A final note: Even where industrial facilities may benefit from a variance granted to a municipality, as indirect discharges they are not exempt from regulation regarding such matters as pretreatment of effluents or other controls. Section 451-A specifically allows the Board to condition municipal variances on such requirements as it deems necessary to maintain <u>or improve</u> water quality and Section 413 grants clear authority to regulate such indirect discharges.

Case 4: In reviewing Case No. 2 above, if from a practical standpoint, the Department wanted to go forward with the joint system, would it be appropriate to issue an Administrative Board Order under the enforcement provisions of the law to bring about the joint treatment project? The Department cannot issue an enforcement order, the effect of which is to

exempt an industry from the requirements of the law.

Discussion of Case 4:

An enforcement order cannot be used to grant variances to industry. If the provisions of Section 451 could be so construed, section 451-A would be rendered unnecessary legislative surplusage. Such results are not favored by courts which attempt to give effect to every word of a statutory provision, Camp Welden v. Johnson, 156 Me. 160 (1960). "Nothing in a statute should be construed as surplusage, if a reasonable construction supplying meaning and force is possible." National Newark & Essex Bank v. Hart, Me., 309 A.2d 512, 521 (1973). The enforcement procedures cannot be used to excuse compliance with a law they were intended to effectuate.

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