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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 10, 1979

Henry E. Warren, Commissioner
Department of Environmental Protection
State House
Augusta, Maine 04333

Dear Commissioner Warren:

The Department of Environmental Protection has requested this office to render its opinion as to the legal authority for the adoption by the Board of Environmental Protection on March 28, 1979 and April 11, 1979 of certain amendments to the State Implementation Plan for Air Quality Control. These amendments are intended to address several different problems, namely: (1) the control of certain air pollutants in specified regions designated non-attainment for that pollutant; (2) control of new and modified major sources in accordance with the Prevention of Significant Deterioration program; (3) other changes necessary for administration of the P.S.D. program. The Board has voted to add several control strategies to Chapter 2 of the plan, revise provisions relating to new sources in Chapter 6 of the plan, add provisions to Chapter 9 of the plan dealing with intergovernmental cooperation and public participation, and add and amend several regulations in Chapter 10 of the plan.

Various kinds of legal authority are asserted by these actions, making their individual consideration necessary. The relevant federal air pollution control regulation, 40 C.F.R. Section 51.11, requires that each state implementation plan "shall show that the State has legal authority to carry out the plan."

1. Legal authority for the control strategy for Bangor/Brewer non-attainment area for total suspended particulates (amendment to Chapter 2.2 by addition of section 2.2.2).

Beyond the continuing application of existing regulations for the control of particulate emissions from traditional stationary sources, the elements of this control strategy are a proposed "joint memorandum of understanding" between the State and the City of Bangor, by which the city would undertake vacuum street cleaning, and the application to this area of newly adopted Regulation 113 concerning growth offsets.

As to the first of these elements, the streets involved are within a specified and limited area in the downtown portion of the City of Bangor, and there can be no serious doubt that the City has the legal authority to maintain the cleanliness of these streets. See 40 C.F.R. Section 51.11(f). A binding contractual agreement could be entered into between the State and the City pursuant to the provisions of Title 39 M.R.S.A. §§1951 et seq. for this purpose, if such legal formality were necessary. A less formal document, made "legally enforceable" in a federal forum by inclusion in the State Implementation Plan, might also suffice.

The authority to adopt Regulation 113 is addressed below.

2. Legal authority for the control strategy for the Augusta non-attainment area for total suspended particulates. (New section 2.2.4)

As in the case of Bangor/Brewer, this control strategy depends upon a memorandum of understanding with the City of Augusta to control open "non-traditional" (mineral) sources of total suspended particulates. The legal authority for this strategy is described in Section 1 above.

3. Legal authority for the control strategy for Rockland/Thomaston non-attainment area for total suspended particulates. (New Section 2.2.5)

This control strategy is entirely implemented through the imposition of conditions on the air emissions license of a single source, which is authorized by 38 M.R.S.A. §590.

4. Legal authority for the control strategy for Baileyville non-attainment area for total suspended particulates. (New section 2.2.6)

This control strategy consists entirely of entry by the Board of a Delayed Compliance Order (DCO) involving the major stationary source in the vicinity. The authority in State law for such an Order, and provisions for its enforcement are found in 38 M.R.S.A. §§347(1), 347(6), 348(1) and 349.

5. Legal authority for control strategy for carbon monoxide, statewide (New section 2.3.1)

All aspects of this control strategy have been included in previous plan submissions. Control over non-point sources and indirect sources of air pollutants are provided, for highways, in 38 M.R.S.A. §606 and, for individual projects, in 38 M.R.S.A. §482(6).

The proper maintenance of motor vehicle air pollution control devices is required by 29 M.R.S.A. §2127, enforced by the State Department of Public Safety.

Consistency between transportation plans and air quality implementation plans are provided by existing memoranda of understanding between the Department of Environmental Protection and the State Department of Transportation, the Lewiston/Auburn Comprehensive Transportation Study and the Portland Area Comprehensive Transportation Study. These memoranda have been reviewed and found to be properly adopted and committing the respective agencies to matters within their respective legal authorities. With respect to LACTS and PACTS, reference may be had to 23 M.R.S.A. §72. Further information is provided in the appended memorandum from legal staff of the state Department of Transportation.

6. Legal authority for control strategy for downtown Lewiston non-attainment area for carbon monoxide. (New section 2.3.2)

This control strategy is completely dependent on traffic control, and is confided to the Department of Transportation and the Lewiston/Auburn Comprehensive Transportation Study. Authority for their traffic control activities is found in the appended memorandum from the legal staff of the state Department of Transportation.

7. Legal authority for control strategy for Bangor non-attainment area for carbon monoxide. (New section 2.3.3)

This control strategy involves exclusively changes in signalization within specified areas of downtown Bangor, responsibility for which is assigned to the Maine Department of Transportation. Their authority for signalization control is likewise found in the appended memorandum from the legal staff of the state Department of Transportation.

8. Legal authority for control strategy for ozone (New section 2.4).

This control strategy, applicable to the Metropolitan Portland and Central Maine Air Quality Control Regions, consists of four separate parts:

(a) New regulation 111 requiring floating roofs on all gasoline and oil storage tanks greater than 40,000 gallon capacity in non-attainment areas. This regulation is adopted pursuant to 38 M.R.S.A. §§585 and 585-A. Under either section, the regulation must be submitted to the next regular or special session of the Legislature for their approval, and is effective until 90 days after their adjournment. If approved by the Legislature, the provision would be adopted as a statute.

(b) New regulation 112 requires volatile organic compound vapor recovery systems for all transfers of petroleum liquids at existing bulk terminals in the non-attainment areas having average daily throughput greater than 20,000 gallons. The authority for this regulation is the same as for regulation 111.

(c) Amended regulation 108 requiring a license for the sources described in (a) and (b) above is authorized by 38 M.R.S.A. §§343 and 590.

(d) A compliance schedule for the only paper coating source in the non-attainment area is provided by conditions on their air emission license, authorized by 38 M.R.S.A. §590, and by consent agreement between the state and the source entered into under 38 M.R.S.A. §347(1).

9. Legal authority for amendments to chapter 6 of the plan concerning new source review.

These revisions consist entirely of new or amended regulations. See section 11 below.

10. Legal authority for revisions to chapter 9 of the plan concerning intergovernmental cooperation.

The addition to section 9.0 (providing information to federal land managers), and new sections 9.4 (public participation) and 9.5 (consultation with other governmental units) merely make commitments to take actions within the Department's discretionary implicit authority.

New section 9.3 involves entering into new memoranda of understanding with the state Department of Transportation, and with the Lewiston/Auburn - and Portland Area Comprehensive Traffic Surveys (Metropolitan Planning Organizations). The authority for these agreements is set forth in section 5 above, and in the appended memorandum from staff counsel for M.D.O.T.

11. Legal authority for new regulations.

(a) New definitions in DEP Regulation 100.0 are authorized by 38 M.R.S.A. §343.

(b) Revisions to DEP Regulation 108 (Licensing) are authorized by 38 M.R.S.A. §§343 and 590.

(c) Revision of DEP Regulation 110 (Ambient Air Quality Standards) is authorized by 38 M.R.S.A. §§343 and 584.

(d) Adoption of DEP Regulation 111 (Emission Standard for Petroleum Storage Vapors) is authorized by 38 M.R.S.A. §§343, 585 and 585-A.

(e) Adoption of DEP Regulation 112 (Emission Standard for Petroleum Liquid Transfer Vapors) is authorized by 38 M.R.S.A. §§343, 585 and 585-A.

(f) Adoption of DEP Regulation 113 (Growth Offsets) is authorized by 38 M.R.S.A. §§343 and 590.

(g) Adoption of DEP Regulation 114 (Classification of Air Quality Control Regions) is authorized by 38 M.R.S.A. §§343 and 583.

(h) Adoption of DEP Regulation 130 (Fees) is authorized by 38 M.R.S.A. §§343 and 361, 9th ¶.

12. The adoption by the Board of Environmental Protection of a Policy on Air Quality Use (Increments) represents merely a declaration of policy within the bounds of their licensing authority.

Henry E. Warren

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May 10, 1979

I expect this responds fully to your request.

Sincerely,

Gregory W. Sample
Assistant Attorney General

GWS:ldp

STATE OF MAINE

Inter-Departmental Memorandum Date May 2, 1979

To David Dixon, Division Chief Technical Services Dept. Environmental Protection
From Thomas Reeves, Attorney Dept. Transportation
Subject Transportation Planning and Air Quality - State Implementation Plan

Under Maine's State Air Implementation Plan (SIP) the responsibility for assuring that transportation and air implementation plans are consistent is a shared undertaking between the Department of Environmental Protection (DEP), the Maine Department of Transportation (DOT), the Lewiston-Auburn Comprehensive Transportation Study (LACTS), and the Portland Area Comprehensive Transportation Study (PACTS). This memo seeks to identify the statutory authority of DOT, LACTS, and PACTS with respect to transportation and air quality planning.

The Maine Transportation Act, 23 M.R.S.A. 4202, et. seq., confers the overall responsibility for balanced transportation policy and planning to DOT. As part of its responsibilities the Commissioner is given the authority "to develop for the State, comprehensive, balanced transportation policy and planning" and "to promote the coordinated and efficient use of all available and future modes of transportation." (23 M.R.S.A. 4206(A) and (C). Air quality planning is encompassed within this general grant of authority.

Specific review of highway projects of four (4) or more lanes is required by 38 M.R.S.A. 606. These projects require that an air quality impact analysis be submitted to DEP.

Federally aided projects must comply with Federal transportation and environmental laws. Most capital improvements to transportation facilities in Maine are Federally funded. Federal transportation law, as set forth in 23 U.S.C.A. 109(h), requires that the final decision on a Federal aid project take into consideration air pollution. Section 109(j) also requires that the U. S. Secretary of Transportation develop guidelines "to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality region designated pursuant to the Clean Air Act, as amended." In addition Federal aid transportation projects must comply with the procedures established by the National Policy Environmental Act, 42 U.S.C.A. 4321.

LACTS and PACTS were established as metropolitan planning organizations in order to meet the planning objectives of 23 U.S.C.A. 134. One of the objectives of 23 U.S.C.A. 134 is that due consideration be given to environmental goals and objectives in the planning of transportation projects. The State statutory authority for LACTS and PACTS, which adopts the objectives of 23 U.S.C.A. 134, is contained in 23 M.R.S.A. 72.

/vv

cc: Greg Sample, DEP
Daniel Webster, DOT