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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

June 2, 1980

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

Re: Natural Resources Council Petition for Reconsideration of Martin Marietta's Air Emission License.

Dear Commissioner Warren:

For the benefit of the Board of Environmental Protection in their consideration of a pending matter, you have requested our opinion on two separate questions.

I. First, we are asked to determine the meaning or legal effect of the proviso clause contained in the statutory definition of the term "air pollution," found at 38 M.R.S.A. § 582(3).[1/] We conclude that, to the extent the conditions stated in the text of the proviso are met, the Board is divested of jurisdiction to consider or apply the affected ambient air quality standards.

1/ "Air pollution" means the presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant or animal life or to property, or which unreasonably interfere with the enjoyment of life and property throughout the State or throughout such areas of the State as shall be affected thereby; excluding, however, all air conditions subject to the requirements of employer-employee contracts, and state or local labor laws and industrial codes insofar as these excluded air conditions are confined to and exist solely within the property boundaries of the person giving rise to that air condition.

DISCUSSION:

The most certain statement that can be made about the "exclusion" contained in the statutory definition of the term "air pollution" is that its intended role in the air quality control laws is extremely uncertain. The general purpose of those laws, enacted as a comprehensive program by P.L. 1969, c. 474, is to confer upon the BEP the authority and mandate to control quantities and concentrations of all air contaminants in the outdoor air of the state, in order to minimize the harms that may be caused thereby. In addition to controlling the quantities of air contaminants emitted from any source, 38 M.R.S.A. § 585, the Board is clearly given jurisdiction over the concentrations of air contaminants in the "ambient air," which means "all air outside of buildings, stacks or exterior ducts." 38 M.R.S.A. §§ 582(5) and 584. The latter section directs the Board to establish ambient air quality standards "limiting the amount and types of air contaminants which may exist in the ambient air." Immediately following this clear affirmative directive, the legislature has provided that "such standards shall be designed to preserve and enhance the quality of ambient air. . . and to prevent air pollution."

The meaning of the first of these purposes is clear and entirely consistent with the remainder of the statutory scheme. The second, while seeming consistent, is apparently at odds with both the statute as a whole and the first stated purpose of the ambient standards, when reference is made to the definition of "air pollution." While the term is defined affirmatively to refer to injurious levels of air contaminants "in the outdoor atmosphere," the definition goes on to exclude "all air conditions subject to [certain other requirements][2/] insofar as these excluded air conditions are confined to and exist solely within the property boundaries of the person giving rise to that air condition." 38 M.R.S.A. § 582(3).

Thus analyzed, the question may be seen as whether the Board's jurisdiction over outdoor concentrations of air contaminants extends to all ambient air, as stated in the mandate to adopt standards and confirmed in the first stated purpose therefor, or rather is limited by the definition of "air pollution," brought into play by the second stated purpose for the adoption of "ambient air" quality standards.

2/ It must be noted that these other requirements -- "employer-employee contracts, and state or local labor laws and industrial codes" -- are extraordinarily vague and lack any express requirement that they serve to protect even human health from the adverse effects of air pollution.

We see no viable alternative to the latter construction, limiting the Board's jurisdiction, notwithstanding the extraordinary indirectness by which this result is achieved, the necessity of inferring a limitation on a mandate that is clear and direct, and the uncertain breadth of the exclusion itself. To conclude otherwise would deprive the exclusion of any meaning or force whatever, in violation of the standard tenet of statutory construction that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[3/] We conclude that the intention of the legislature expressed in the proviso to the definition of "air pollution" is apparent, though its expression is awkward. When the intention of the legislation is evident, it must be given effect.

We have considered the argument advanced in the petition of the Natural Resources Council, that the proviso is so inconsistent with the overriding purpose and all the other sections of the air quality laws that it should be given no effect, and that the only authority given the Board to exempt a source from the ambient air quality standards is found in the variance provision, § 587. However, in our view the inconsistency is insufficient to void the effect of the proviso, but rather serves only to require that it be narrowly interpreted and applied. Logic and Professor Sutherland confirm that

> where there is doubt. . . as to the extent of a restriction imposed by a proviso on the scope of another provision's operation, the proviso is strictly construed. The reason for this is that the legislative purpose set forth in the main or dominant body of an enactment is assumed to express legislative policy, and only those subjects expressly exempted by the proviso should be freed from operation of the statute.[4/]

In the case under consideration, we believe that a narrow construction of the proviso is necessary to make it consistent with the purposes of the statute as a whole. The text of the proviso itself limits the exclusion to "air conditions [which]

3/ Sutherland, Statutory Construction, § 46.06, 4th ed., 1973.

4/ Sutherland, Statutory Construction, § 47.08, 4th ed., 1973.

are confined to and exist solely within the property boundaries" of the source of the air emissions. For some air pollutants, this confinement might be achieved by an actual physical barrier. Most air contaminants however are gaseous or consist of very fine particles suspended in the air. With respect to these pollutants, confinement to the property of the source is unlikely to be achieved by any physical restriction. In either case, the Board is confronted with a question of fact: whether under any circumstances the "air condition" excluded from their jurisdiction by operation of the proviso will spill over the property line and at that point cause a violation of an ambient air quality standard. By its terms, it is clear that the proviso can have no legal effect beyond the property boundaries of the source.

More important, we think it both reasonable and necessary to limit the potentially very broad reach of the terms "the requirements of employer-employee contracts, and state and local labor laws and industrial codes." Since in the context of the statute the existence of these documents may operate to displace the jurisdiction of the Board, and its jurisdiction is a matter for the Board to determine,[5/] the Board must review any such documents offered in support of a claim that its jurisdiction is limited.[6/] The proviso specifies that any excluded air condition be "subject to the requirements" of these documents. To implement the proviso in a manner consistent with the rest

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5/ State ex rel Brennan v. R. D. Realty Corp., 349 A.2d 201 (Me. 1975).

6/ An additional reason for according the Board the authority to review any claim that its jurisdiction is limited by the proviso is the possibility that, absent such review, the proviso might be an unconstitutional delegation of power to private parties or to another governmental agency. See Carter v. Carter Coal Co., 298 U.S. 238, 310-312 (1936) (unconstitutional delegation to private parties); State v. Gauthier, 121 Me. 522 (1922) (unconstitutional delegation by Maine Legislature to federal government); Congressional Research Service, Library of Congress The Constitution of the United States of America, 77-78 (2d ed. 1973) (private parties); Davis, Administrative Law Treatise § 3:12 (2d ed. 1978) and Davis, Administrative Law Treatise, § 2:14 (1st ed. 1958) (private parties); L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937); G. Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind.L.J. 650 (1975). It would seem that if the Board were able to review the sufficiency of any contract, law or code, there would be no claim of unconstitutional delegation since the final decision as to the Board's jurisdiction would rest with it and not with some other entity.

of the statute, we find it necessary to infer from this language (1) that there must be provisions in the tendered documents that do in fact address permissible levels of air pollution, and (2) that these provisions must be legally binding on the source of the emissions. Only under these circumstances would an alternative legal framework for air pollution control exist. In the absence of such an alternative control regime, no reasonable relation to the harms addressed by the statute as a whole can be attributed to the proviso.

II. Second, we are asked to determine what "best practical treatment" requirements under the Board's regulations, specifically chapter 108,[7/] would apply to an existing Portland cement plant proposed for modification, which will cause an increase in potential emissions of one air contaminant (sulfur dioxide) of more than 100 tons per year, a potential increase of other air contaminants (including particulate matter) of less than that amount, and which will be located in an area designated "non-attainment" for particulate matter.

In our analysis, the answer to that question turns almost entirely upon an interpretation of the definition of the term "major emitting source," found in the Board's regulations, chapter 100, § 20. At issue is whether that definition requires that if a source is "major" for purposes of one pollutant, it is "major" for all, or whether a pollutant by pollutant determination may be made.

We conclude that under the most straightforward application of the several regulations, the modified cement plant described would constitute a "major emitting source" for all purposes, and consequently BPT would consist of "best available control technology" for all pollutants except particulate matter, as to which "lowest achievable emission rate" would be required.

DISCUSSION:

Both the air emission licensing statute, 38 M.R.S.A. § 590, and the Board's emission licensing regulations, chapter 108, § 4(A), require that any emission given a license must receive "best practical treatment." The regulation further specifies that the emission must receive "best practical treatment as defined in section 6." Chapter 108, § 6 contains different definitions of "best practical treatment" for three categories of emission sources. Subsections (B) and (C) apply to "new or modified major emitting sources." Subsection (A) governs all other sources.

7/ Emission License Regulation

Our analysis must begin then by determining whether the specified modification constitutes a "major emitting source," a term which is defined in Regulations, chapter 100, § 20.[8/] Both the term "major emitting source" and the opening language of its definition ("means any of the following emission sources") strongly suggest an intention to have the term apply to an entire source, rather than to the emission of a single pollutant. This notion is reinforced by the listing of 26 specific types of heavy industrial sources, such as Kraft pulp mills, petroleum refineries and chemical process plants, that obviously emit a variety of air pollutants.

There is further support for this view in the fact that the Board's definition of "major emitting source" was adopted, together with the other regulations involved in this opinion, to establish in state law a program for the "Prevention of Significant [Air Quality] Degradation" (PSD), to enable state administration of the PSD program designed by Congress in the 1977 Amendments to the Clean Air Act.[9/] Both the list of industrial sources and the remaining language of the definition of "major emitting source" are taken nearly verbatim from the text of the federal law.

8/ The term "major emitting source" means any of the following emission sources of air contaminants which emit, or have the potential to emit, one hundred tons per year or more of any air contaminants:

> [List of 26 types of emission sources, including "F. Portland cement plants"]
>
> Such term shall also include any modification in such source such that the potential emissions of any regulated pollutant is increased according to the above definition.
>
> For the purposes of new sources which seek to locate in or whose emissions may reasonably be expected to affect designated nonattainment areas, the term "major emitting source" shall include any source which emits or has the potential to emit one hundred tons per year or more of any air contaminants.

9/ Pub. L. 95-95, 91 Stat. 685, 42 U.S.C. § 7401, et seq. (1978).

Thus we think it significant that the federal Court of Appeals for the District of Columbia Circuit, in the course of a comprehensive review of the E.P.A. regulations for administration of the federal PSD program, concluded that the Clean Air Act definition of "major emitting facility" "is not pollutant-specific, but rather identifies sources that emit more than a threshold quantity of any air pollutant" (emphasis in original).[10] The Court recognized that

> once a source has been so identified, it may become subject to [the PSD program's] substantial administrative burdens and stringent technological control requirements for each pollutant regulated under the Act, even though the air pollutant, emissions of which caused the source to be classified as a "major emitting facility," may not be a pollutant for which NAAQS [National Ambient Air Quality Standards] have been promulgated or even one that is otherwise regulated under the Act.[11]

But from the Court's review of the substantial legislative history of the PSD program, they concluded that:

> Congress's intention was to identify facilities which, due to their size are financially able to bear the substantial regulatory costs imposed by the P.S.D. provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air.[12]

While the BEP was free to exercise its own state law authority to adopt a PSD program different from the federal program, these regulations were in fact submitted to the EPA for approval so that the Maine program could operate in lieu of the federal program, rather than in addition to it. Consequently, we feel confident that the Board intended a source-by-source, rather than pollutant-by-pollutant definition of "major emitting source," in order to be consistent with Congressional intention, and thus gain federal approval.

10/ Alabama Power Company v. Costle, F.2d, 13 E.R.C. 1993, 2003 (D.C. Cir., 1979).

11/ Id.

12/ Id.

By this reading, Maine's definition provides that a Portland cement plant, among other listed types of sources, is a "major emitting source" if it will "emit, or have the potential to emit, one hundred tons per year or more of any air contaminants [sic]." Given the use of the word "any" in the phrase "any air contaminants," we interpret the definition to include an emission source which has actual or potential emissions crossing the tons-per-year threshold for only one air contaminant, as in the case at hand. The term is expressly made to include facility modifications exceeding the same threshold. Since, in the case specified, new emission attributable to the modification will exceed 100 tons per year for at least one pollutant, there can be no doubt that the modification constitutes a "major emitting source." Whether other modifications would also fall within the definition is not addressed by this opinion.

Once it is concluded that an entire source is a "major emitting source," subsections (B) and/or (C) of Chapter 108, § 6 describe the "best practical treatment" that will be required of that source.

Chapter 108, § 6(B) defines the term "best practical treatment" for new emissions in attainment areas (which the area impacted by the source under consideration is, as to all pollutants except particulate matter) in relevant part as follows:

> 1. For any new or modified major emitting source which submits a license application after January 1, 1979 "Best Practical Treatment" shall mean "Best Available Control Technology" (BACT). Best Available Control Technology" means an emission limitation based on the maximum degree of reduction of each pollutant emitted from or which results from the new or modified source, which the Board, on a case by case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for such source through application of production processes and available methods, systems, techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant. (Emphasis added.)

From the face of this definition it is apparent that once a source qualifies for licensing treatment as a major emitting source, it must receive BACT for all pollutants emitted.

However, the source under consideration will locate in an area that has been designated nonattainment for particulate matter, meaning that the ambient air quality standard for that air contaminant is not being met in that area. Consequently, § 6(C) is applicable, which provides that:

> For any new or modified major emitting source which submits a license application to locate in or whose emissions may reasonably be expected to impact any designated Nonattainment Area, "Best Practical Treatment" shall mean "Lowest Achievable Emission Rate" [LAER] for those pollutants emitted by the facility which are the cause of the nonattainment designation for that area.

In contrast to the BACT portion of the regulation, LAER can only apply to those pollutants as to which the ambient air quality standard has not been achieved in that area, in this case only particulate matter. But like BACT, the LAER requirement is triggered by the determination that the new emissions are from a "major emitting source," whether new or modified.

By its terms, the LAER regulation applies to any new or modified major emitting source locating in or impacting any nonattainment area. When those criteria are met, LAER is required for any emission of the pollutant for which the area is nonattainment. There is no indication in the language of the LAER regulation that it applies only to emissions of a certain magnitude. Rather, the sole focus is on whether the source qualifies as a "major emitting source."

Thus in the case at issue, LAER would be required for particulate matter, even though emissions of that air contaminant will not exceed the tons-per-year threshold, because the threshold is exceeded for potential emissions of sulfur dioxide.

I hope this information is helpful. Please feel free to contact me if I can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/ec