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ATTORNEY GENERAL

86-6-A

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

March 10, 1986

The Honorable Thomas H. Andrews
The Honorable Larry M. Brown
The Honorable Mary Najarian
State Senate
State House
Augusta, Maine 04333

The Honorable John N. Diamond
Majority Leader
House of Representatives
State House
Augusta, Maine 04333

Dear Senators Andrews, Brown, & Najarian & Representative Diamond:

You have requested an opinion from this Office concerning the legality of certain provisions of proposed L.D. 2107, "An Act to Clarify the Application of Water Quality Standards to Hydroelectric Projects," reported by the Majority of the Committee on Energy and Natural Resources. Representative Diamond has also asked for an opinion concerning the constitutionality of the original bill, L.D. 2032, submitted by the Governor, and of Committee Amendment "A" to L.D. 2032 reported by the Minority of the Committee on Energy and Natural Resources.

The questions you have raised focus on the following issues:

1) whether section 2 of L.D. 2107 requiring mandatory issuance of a water quality certification for all hydropower projects that have received permits pursuant to 38 M.R.S.A. §§ 630-636 violates any provisions of the Federal Water Pollution Control Act or the regulations promulgated thereunder by the U.S. Environmental Protection Agency;

2) whether section 3 of L.D. 2107 requiring legislative review of hydropower regulations adopted by the Board of Environmental Protection or by the Land Use Regulation Commission is constitutional;

3) whether the retroactivity provision of section 4 of L.D. 2107 would violate constitutional principles of separation of powers or due process or any relevant statutory or common law; and

4) whether the original version of L.D. 2032 or Committee Amendment "A" thereto are subject to any legal or constitutional infirmity identified with respect to L.D. 2107.

In an effort to respond to these questions, the Department of the Attorney General has reviewed the proposed legislation in conjunction with pertinent provisions of state and federal law and regulations. Based on that review and analysis, the Department concludes as follows:

1. To the extent section 2 of L.D. 2107 requires mandatory certification by the Commissioner of DEP or the Director of LURC of hydropower projects that do not meet the existing water quality standards set forth in the State's water classification system, it conflicts with the federal statutory scheme of the Clean Water Act and EPA's regulations adopted pursuant to that Act. Under these circumstances, until and unless EPA approves this legislative modification of the State's water classification system, issuance of a certification under section 2 for a project that does not meet existing water quality standards would violate the Clean Water Act and hence be subject to invalidation.

2. Legislative review of the Board's or LURC's hydropower regulations, as provided in section 3 of the proposed bill, appears to be constitutional insofar as the requirement of legislative review does not grant authority to the legislative standing committee to disapprove the rules or to prevent them from taking effect except by statute enacted by the Legislature and signed by the Governor.

3. The retroactivity provision of section 4 of L.D. 2107 is not unconstitutional but, to the extent it requires a certification to be issued for a project that does not meet existing water quality standards or purports to amend the State's water classification system without EPA approval, it suffers from the same deficiencies identified in paragraph 1 above.

4. Both L.D. 2032, as originally proposed by the Governor, and Committee Amendment "A" contain amendments to existing water quality standards that are subject to EPA approval, but neither proposal has any of the legal infirmities associated with L.D. 2107.

The basis for these conclusions is set forth below.

## Statutory and Regulatory Framework

The Federal Water Pollution Control Act, P.L. 92-500 as amended (commonly referred to as the Clean Water Act), establishes a comprehensive federal water pollution control program. While it depends in large part upon the states for its implementation, there is no question that the federal government has the last word in virtually all decisions.

The stated objective of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." P.L. 92-500, § 101(a), codified as 33 U.S.C. § 1251(a). To achieve that objective, the Act directs that water quality standards be adopted by the states and approved by the Administrator of the U.S. Environmental Protection Agency (EPA). 33 U.S.C. § 1313(c). Such standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for those waters based upon such uses." Id. The standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act," id., and shall be established "taking into consideration their use and value for public water supplies, propagation of fish, shellfish and wildlife, recreation in and on the water, and agricultural, industrial and other purposes, including navigation," 40 C.F.R. § 131.2 (based upon 33 U.S.C. § 1313(c)(2)). Once standards are established and approved by EPA, no federal agency may grant a license or permit for construction and operation of a hydropower project without first receiving either a valid certification from the state that the project will comply with those water quality standards or a waiver of the certification requirements. P.L. 92-500, section 401(a), codified as 33 U.S.C. § 1341(a)(1).

Under this scheme, the states are primarily responsible for implementation of the goals and objectives of the Clean Water Act through the process of adopting standards and acting on requests for certification. To ensure consistency with the requirements of the federal law, all new and revised water

quality standards on which certifications are based must be submitted to EPA for review and approval. The standards will be approved only if they are determined by EPA to be consistent with the applicable requirements of the Clean Water Act.[1/] If EPA determines that the proposed standards are not consistent with the Act, then the Administrator is statutorily obligated to notify the state, specifying the changes needed to meet the Act's requirements. If those changes are not adopted by the state within ninety days thereafter, EPA is required to promulgate standards that will apply to the navigable waters of that state. 33 U.S.C. §§ 1313(a), (c)(2) & (3). Despite the responsibility given to the states under the Clean Water Act, therefore, "the states are not given unreviewable discretion to set water quality standards . . . EPA is given the final voice on the standard's adequacy." Mississippi Commission on Natural Resources v. Costle, 625 F.2d 1269, 1275 (5th Cir. 1980). The states are authorized to adopt water quality standards that are more stringent but not any less stringent than the Clean Water Act requires. See Mianus River Preservation Committee v. Administrator, EPA, 541 F.2d 899, 906 (2nd Cir. 1976); Homestake Mining Company v. United States Environmental Protection Agency, 477 F.Supp. 1279, 1283-84 (D.S.D. 1979) (EPA has no authority to declare invalid state standards that are more stringent than Clean Water Act); Cf. Kentucky v. Train, 9 ERC 1280 (E.D. Ky. 1976) (upholding EPA's disapproval of state standards failing to meet minimum requirements of Clean Water Act). Once standards are either adopted by the state and approved by EPA, or promulgated directly by EPA, those standards "shall thereafter be the water quality standards for the applicable waters of that state." 33 U.S.C. § 1313(c)(3). In short, regardless of what Maine government may say or do, it is the federal government and the federal courts that have the last word.

The water quality standards adopted to date by the State of Maine are contained in the State's water classification scheme,

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[1/] The regulations under which EPA reviews state water quality standards require, among other things, that EPA determine whether those standards designate water uses consistent with the requirements of the Clean Water Act and specify criteria that protect those uses and whether the state has followed its legal procedures for revising or adopting those standards. 40 C.F.R. § 131.5.

codified at 38 M.R.S.A. §§ 363-363-B.[2] In accordance with the requirements of the Clean Water Act and EPA regulations promulgated pursuant to that Act, the standards contained in that scheme specify the designated uses for the waters of the State and water quality criteria for such waters based upon those uses. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.3(i).[3] These standards have been approved by EPA.

Section 2 of L.D. 2107

The questions you have asked with respect to section 2 of L.D. 2107 relate primarily to the first two provisions of section 2 which would amend existing section 634(1) of the Maine Waterway Development and Conservation Act (MWDCA) to provide for:

> 1. Mandatory issuance of a water quality certification by the Commissioner of the Department of Environmental Protection (or, for projects in the unorganized territories, the Director of the Land Use Regulation Commission) within five days of the applicant's request in every case in which the Board of Environmental Protection or LURC approves an application for a hydropower permit pursuant to the MWDCA; and
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> 2. A statement to be contained in each certification that "there is a reasonable assurance that the [proposed hydroelectric] project will not violate the applicable water quality standards."

We address each of these in turn.

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[2] These are the standards that were applied by the Board of Environmental Protection in reviewing Great Northern Paper Company's request for water quality certification for the Big "A" project. They are also the standards that are currently under review by the Legislature pursuant to L.D. 1503. Both section 1 of L.D. 2107 and the Governor's bill, L.D. 2032, would amend these standards and would therefore need EPA approval.

[3] An example of a designated use is recreation in and on the water or fish and wildlife habitat; an example of water quality criteria is dissolved oxygen content.

In cases where the BEP or LURC follows its procedures and those of the Administrative Procedure Act and finds that a project satisfies the EPA-approved water quality standards, section 2 presents no legal difficulties. In cases where a project does not satisfy water quality standards, or where no finding has been made, however, section 2 poses a significant difficulty. Its effect then would be to require all hydropower projects permitted under the MWDCA to receive water quality certification without regard to whether those projects can or will satisfy the EPA approved water quality standards set forth in the State's water classification scheme. Put another way, the mandatory issuance requirement of section 2 exempts hydropower projects from the requirement that they satisfy the State water quality standards that have been approved by the EPA.

The automatic certification therefore raises a conflict with the federal Clean Water Act in two ways. First, to the extent that 38 M.R.S.A. § 634(1), as amended by L.D. 2107, exempts water quality certification requests for hydropower projects from review under the State's water classification scheme altogether, it fails to assure compliance with applicable water quality standards and thereby frustrates the purposes and objectives of the Clean Water Act articulated in 33 U.S.C. §§ 1251(a), 1313 and 1341. Second, and perhaps more important, implementation of L.D. 2107 would result in a direct conflict with the requirements of the Clean Water Act and EPA's regulations under circumstances in which certification was mandatorily issued for a hydropower project that did not satisfy Maine's existing, federally-approved, water quality standards.[4/]

That conflict results because the MWDCA itself does not address water quality standards as such. The MWDCA has never been submitted to or approved by EPA. It does not at the present time designate uses or establish criteria consistent with the goals of the Clean Water Act, nor does it cross-reference or incorporate by reference the water quality standards contained in 38 M.R.S.A. §§ 363-363-B. The permitting scheme of the MWDCA relies in large part on a balancing process to evaluate the relative advantages and disadvantages of a proposed hydropower project in terms of its environmental and energy impacts. Although this balancing

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[4/] This is the conflict that confronted the Board of Environmental Protection on January 8, 1986 when it considered Great Northern's request for water quality certification for the Big "A" project.

process includes consideration of water quality, the MWDCA does not require that water quality standards be satisfied as does the certification requirement under section 401 of the Clean Water Act. Indeed, the balancing process expressly contemplates that the disadvantages of a particular project in terms of its effect on water quality can be outweighed by the energy or other benefits of the project, thereby allowing issuance of a hydropower permit pursuant to 38 M.R.S.A. § 636 even if water quality standards cannot be satisfied.

The second provision that would be added to 38 M.R.S.A. § 634 by L.D. 2107 requires the Commissioner of DEP or the Director of LURC to state the conclusion that there is a reasonable assurance that the proposed hydropower project will not violate applicable water quality standards, without regard to whether findings necessary to support that conclusion can be made on the basis of substantial evidence in the record. Indeed, because the existing provisions of 38 M.R.S.A. § 634(1) preclude the Department of Environmental Protection from engaging in "any proceedings" or applying "substantive criteria" in addition to the criteria contained in the MWDCA, the agency record will consist of no more than the request for certification and a copy of the hydropower permit or proof that one has been issued. Review of requests for certification under this statutory scheme will involve no evidentiary inquiry at all because the only factual or legal pre-requisite to issuance of water quality certification will be the approval of a hydropower permit pursuant to section 636 of the MWDCA. Since, as noted above, the certification process requires a determination that water quality standards will be satisfied, the absence of an agency record setting forth the basis for such a determination presents a serious legal difficulty under both state and federal law. In addition to the requirements of Maine law, EPA's regulations require that a water quality certificate shall include "a statement that the certifying agency has either (i) examined the application made by the applicant to the [federal] licensing or permitting agency . . . and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement" concerning reasonable assurance of compliance with applicable water quality standards. 40 C.F.R. § 121.1(a)(2).

For the foregoing reasons, it is the opinion of this Office that certifications issued pursuant to section 2 of L.D. 2107 for projects that do not comply with the existing water

classification scheme would conflict with the federal Clean Water Act and would be subject to invalidation if challenged unless EPA first approves the MWDCA as an amendment to the State's water quality standards under section 303(c) of the Clean Water Act.[5/]

## Section 3 of L.D. 2107

Section 3 of L.D. 2107 provides that all hydropower rules adopted by the Board of Environmental Protection or by LURC pursuant to the MWDCA shall be submitted for review by the joint standing committee of the Legislature with jurisdiction over natural resources. It also would delay the effective date of the rules. We interpret this provision to authorize only "review" of the rules, not approval or disapproval of their content or the exercise of any legislative veto by the Energy and Natural Resources Committee. Accordingly, we conclude that section 3 of L.D. 2107 is constitutional as written. See Opinions of Attorney General 76-215 (11/4/76) and 83-5 (8/15/83).

The delay in the effective date of the rules appears to be designed merely to give the Legislature time to exercise its authority to amend the statute in response to the rules and does not by itself, or in conjunction with the review requirements, violate any provision of the Maine Constitution.[6/] Once the rules take effect ninety-one days after adjournment of the next regular legislative session, they will have the force of law and shall remain in effect

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[5/] Because the MWDCA does not include any chemical or biological criteria for protecting designated uses such as the protection and propagation of fish or recreation in and on the water and allows water quality impacts to be outweighed in the balancing process, and because it contains no anti-degradation policy in accordance with the requirements set forth in 40 C.F.R. § 131.12, L.D. 2107's substitution of its criteria for those of the State water quality standards runs directly contrary to federal environmental policy. It is therefore unlikely to be approved by EPA.

[6/] Indeed, these so-called "report and wait provisions" are considered constitutional under federal law even after the United States Supreme Court's decision in INS v. Chadha, ___ U.S. ___, 103 S.Ct. 2764 (1983) striking down the legislative veto. See Tribe, The Legislative Veto: A Law by Any Other Name?, 21 Harv. J. Legis. 1, 18 (1984). See also, Note, The Fate of the Legislative Veto after Chadha, 53 G.W.L.Rev. 168, 180 (1984 - 1985).

unless and until the Legislature as a whole renders them void by amending provisions of the MWDCA to make the rules inconsistent with the enabling statute. While the extra time allowed makes it possible for the Legislature to void provisions of the rules by amending the statute before the rules take effect, that same authority could be exercised as well after the effective date of the rules. Section 3 of L.D. 2107, therefore, is constitutional as written.

Section 4 of L.D. 2107

Section 4 expressly provides that L.D. 2107 "shall apply retroactively to all permits issued under [38 M.R.S.A.] § 630 and to all hydropower water quality certificate applications which have been before the Board of Environmental Protection or the Maine Land Use Regulation Commission."[7/] In addition, section 4 states that any prior Board or Commission action "inconsistent with the requirement of mandatory issuance of a water quality certificate is void."

To the extent that this language purports to require issuance of a certification which has already been determined to be unissuable under the State's existing, EPA-approved water quality standards, it suffers from the same legal infirmities discussed above in relation to the mandatory issuance provisions of section 2 of L.D. 2107. To the extent that this provision attempts to apply retroactively a substantive change in the State's water classification scheme, it cannot do so in the absence of EPA approval of that change for the same reasons.

The mere fact that section 4 would apply the regulatory scheme imposed by L.D. 2107, section 2 retroactively does not, however, render it illegal or unconstitutional in our view. If the legislative intent to give a statute retroactive application is plain, that intention must be given effect unless to do so would violate some constitutional provision. Bowman v. Dyer, 127 Me. 351, 355, 143 A. 272 (1928).[8/]

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[7/] This language is technically incorrect in that hydropwer permits are issued pursuant to 38 M.R.S.A. § 636, not § 630, and the operative term under the Clean Water Act and the Department's regulations is "request for water quality certification," not "certificate application." 11 U.S.C. § 1341(a)(1); Department Regulations, ch. 1.

[8/] 1 M.R.S.A. § 302 (1979) expresses a general rule of statutory construction which cannot be said to conflict with or overrule the express provisions of L.D. 2107, section 4.

The Maine Constitution does not expressly prohibit enactment of retroactive laws. Whether a retroactive law is constitutional depends upon its effects. Retroactive laws will be deemed unconstitutional if they impair an obligation of contract, violate a person's due process rights, disturb or destroy vested rights or create new obligations or impose new liabilities with respect to past transactions. See generally 16A CJS Constitutional Law, §§ 391-393 (1984); compare Sebasteanski v. Pagurko, 232 A.2d 524 (Me. 1967) (statute validating deeds without seal held not to apply retroactively as against innocent third party purchaser who acquired property rights before date of enactment), and Merrill v. Eastland Woolen Mills, Inc., 430 A.2d 557 (Me. 1981) (statutory amendment applied retroactively where substantive rights of parties not affected). To the extent that L.D. 2107 applies retroactively to any request for water quality certification and does not appear to disturb any vested contract or property rights, it would not appear to violate the constitution.[9/]

Accordingly, it is the Opinion of this Department that the retroactive application of L.D. 2107 does not appear to violate any constitutional provision. In the absence of EPA approval of the MWDCA permitting criteria as an acceptable modification to existing water quality standards for hydropower projects, however, and an agency determination that those standards had in fact been satisfied, a certification issued by the Commissioner or Director would nonetheless most likely be

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[9/] The retroactivity provision of L.D. 2107, section 4 also does not violate the separation of powers or enactment provisions of the Maine Constitution. Although the proposed legislation would nullify an adjudicatory determination of an administrative agency in the executive branch, that is not an unconstitutional "legislative veto" because it can only become law when adopted by both the House and Senate and signed by the Governor in accordance with the enactment provisions of Article 4, Part 1, Section 1 and Part 3, Section 2 of the Maine Constitution. Administrative agencies are created by statute and may be abolished by a properly enacted statute if the Legislature and the Governor so desire. Accordingly, decisions of those agencies may be overruled by statute provided, as discussed above, that such an action does not unconstitutionally impair the vested rights of private citizens.

challenged by EPA or invalidated in court for the same reasons outlined in the discussion of section 2 of L.D. 2107.[10]

L.D. 2032, and Committee Amendment "A" to L.D. 2032

Both the Governor's original version of L.D. 2032 and the Committee Minority's Amendment "A" to L.D. 2032 would amend Maine's existing water classification scheme by adding a new section 363-C modifying the standards for proposed hydroelectric impoundments that will thermally stratify. As such, both proposals would be subject to EPA review to determine whether the change in standards is consistent with the goals and requirements of the Clean Water Act. Since neither the Governor's bill nor the Minority bill exempts hydroelectric projects from review and approval pursuant to existing water quality standards, nor do they apply retroactively, there is nothing unconstitutional in these proposals.[11]

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[10] The application of section 4 to "all permits issued" under the MWDCA and all certificate applications "which have been before" the Board or LURC also throws into question all water quality certifications that have ever been issued for hydropower projects since the MWDCA was enacted in 1983. Because the statutory scheme that would be established under L.D. 2107 exempts hydropower projects from review under existing water quality standards, conditions that have previously been imposed in certifications to assure compliance with those standards are potentially rendered invalid by virtue of the retroactivity provision.

[11] Indeed, EPA has already approved a dissolved oxygen standard for the State of Mississippi that is similar to the Minority Committee bill in providing for measurement of dissolved oxygen only in the epilimnion of a stratified impoundment. 40 C.F.R. § 131.33.

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I hope the foregoing is of some assistance to you as the Legislature considers this important legislation. Please feel free to reinquire if further clarification is necessary especially if additional changes to L.D. 2107 are proposed.

Sincerely,

JAMES E. TIERNEY
Attorney General

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