

MAINE STATE LEGISLATURE

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

June 7, 1989

Representative Michael Michaud
Maine House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Representative Michaud:

You have asked whether the Board of Environmental Protection has been authorized by the Legislature to adopt regulations to establish color standards for Maine waters. For the reasons which follow, it is the opinion of this Department that the Board of Environmental Protection does have such authority.

The Legislature has stated that it is the duty of the Board of Environmental Protection ". . . to control, abate and prevent the pollution of the air, waters, coastal flats and prevent diminution of the highest and best use of the natural environment of the State." 38 M.R.S.A. § 361. To carry out its duties, the Board of Environmental Protection has been invested with broad rulemaking authority. 38 M.R.S.A. § 343-A provides as follows:

The Board of Environmental Protection may adopt, amend and repeal reasonable rules and emergency rules necessary for the proper administration, enforcement, implementation and interpretation of any provision of law that the Department is charged with the duty of administering. Rules duly promulgated shall have the full force and effect of law.

Among the laws the Board is charged with administering is the Water Classification Program. 38 M.R.S.A. §§ 464-470. The Water Classification Program establishes a classification

system for the waters of the State and provides, inter alia, that waste discharge licenses may not be issued by the Board of Environmental Protection for categories of discharges, including:

Discharge of pollutants to waters of the State which imparts color, taste, turbidity, toxicity, radioactivity or other properties which cause those waters to be unsuitable for the designated uses and characteristics ascribed to their class
38 M.R.S.A. § 464(4)(A)(4).
(emphasis added)

This Department believes that the broad rulemaking authority in § 343-A clearly allows the adoption by the Board of Environmental Protection of a regulation establishing color standards for Maine waters as well as color standards for individual discharges to Maine waters.

The Board of Environmental Protection not only has the authority to adopt rules establishing color standards, but it may well be argued that the Board was required by the Legislature to adopt such regulations by January 1, 1987. When the Legislature enacted the Water Classification Program (P.L. 1985, c. 698, § 15, eff. July 16, 1986), it directed the Board to adopt rules necessary to implement the Program:

In accordance with the Maine Administrative Procedure Act, the board shall promulgate rules necessary to implement the water quality classification system established by this article. In promulgating rules, the board shall solicit and consider, in addition to any other materials, information on the economic and environmental impact of those rules.

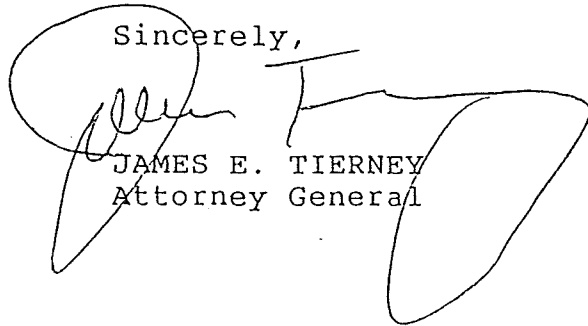
Rules shall be promulgated by January 1, 1987, and as necessary thereafter, and shall include, but are not limited to, sampling and analytical methods, protocols and procedures for satisfying the water quality criteria, including evaluation of the impact of any discharge on the resident biological community.

Rules adopted pursuant to this subsection shall become effective upon adoption. Rules adopted pursuant to this subsection shall be submitted to the joint standing committee of the Legislature having jurisdiction over natural resources for review during the next regular session of the Legislature following adoption. This committee may submit legislation it deems necessary to clarify legislative intent regarding rules adopted pursuant to this subsection. If the committee takes no action, the rules shall continue in effect. 38 M.R.S.A. § 464(5). (emphasis added)

As noted earlier, the water quality classification system referred to in § 464(5) includes the prohibition against issuance of licenses for the "discharge of pollutants to waters of the State which imparts color . . . which cause those waters to be unsuitable for the designated uses and characteristics" § 464(4)(A)(4).

Whether the Board's authority derives from the required rulemaking pursuant to § 464(5) or the discretionary rulemaking pursuant to § 343-A, it is clear that the Board has been granted the authority by the Legislature to adopt color standards for Maine waters.

Sincerely,



JAMES E. TIERNEY
Attorney General

JET/d