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ANDREW KETTERER
ATTORNEY GENERAL

REGIONAL OFFICES:

96 HARLOW ST., SUITE A
BANGOR, MAINE 04401
TEL: (207) 941-3070

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

Telephone: (207) 626-8800
FAX: (207) 287-3145

November 13, 1995

James Brooks
Director, Bureau of Air Quality Control
State House Station 17
Augusta, Maine 04333

Legal Opinion Concerning Part 70 Program Required by Title V of the Clean Air Act

Dear Mr. Brooks:

Title V of the Clean Air Act Amendments of 1990 requires each state to develop an operating permits program commonly known as a "Part 70 Program" for certain sources of air pollution. See 42 U.S.C. § 7661a(d)(1) and 40 C.F.R. Part 70. As part of Maine's program submittal, the Maine Attorney General must certify that the state laws provide adequate authority to carry out all aspects of the Part 70 operating permit program. See 42 U.S.C. § 7661a(d) and 40 C.F.R. § 70.4(b)(3).

Pursuant to 5 M.R.S.A. § 8056(1)(A), on October 23, 1995 my office approved as to form and legality the Maine Department of Environmental Protection's recent Part 70 Program rulemaking, the promulgation of DEP Regulations Chapter 140 and amendments to Chapters 100 and 115. In accordance with Section 502(d) of the Federal Clean Air Act ("CAA") and 40 C.F.R. § 70.4(b)(3), it is the opinion of this Department that the laws of the State of Maine provide adequate authority to administer and enforce the Part 70 program which the Maine Department of Environmental Protection ("DEP") has submitted to the U.S. Environmental Protection Agency ("EPA") for approval. Specific legal authorities supporting this conclusion include the lawfully adopted and fully effective state laws and regulations identified below.

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1. AUTHORITY TO ISSUE PART 70 LICENSES

State law provides authority for Department of Environmental Protection ("DEP") to issue Part 70 licenses to all air pollution sources within the State of Maine which are required to have licenses under Section 502(a) of the CAA and 40 C.F.R. Section 70.3 ("Part 70 sources"), including authority to issue Part 70 licenses for solid waste incineration units combusting municipal waste under Section 129(e) of the CAA, and to assure compliance with the requirements of 40 C.F.R. Part 70.

Federal Authority: CAA §§ 129(e), 502(a)-(b), 503, 504(a), 42 U.S.C. §§ 7429(e), 7661a(a)-(b), 7661b, 7661c(a); 40 C.F.R. §§ 70.4(b)(3)(i), 70.4(b)(3)(iv), 70.5(a), 70.6, 70.7(b).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-A(1), 341-D, 347-A, 347-C, 348, 349, 581, 582, 585-A, 585-B, 589, 590, 590-A, 591; DEP Regulations Chapters 2, 20, 30, 100 through 140.

Remarks of the Attorney General:

Maine law provides authority for the DEP to issue Part 70 licenses to all air pollution sources within the State of Maine which are required to have licenses under Section 502(a) of the CAA and 40 C.F.R. Section 70.3 ("Part 70 sources"), including authority to issue Part 70 licenses for solid waste incineration units combusting municipal waste under Section 129(e) of the CAA, and to assure compliance with the requirements of 40 C.F.R. Part 70. 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-A(1), 341-D, 347-A, 347-C, 348, 349, 581, 582, 585-A, 585-B, 589, 590, 590-A, 591; DEP Regulations Chapters 2, 20, 30, 100 through 140. 38 M.R.S.A. § 590 gives the DEP broad authority to issue licenses to persons that may "operate, maintain or modify . . . any air contamination source or emit any air contaminants" anywhere in the State; and this broad authority includes authority to issue Part 70 licenses for solid waste incineration units combusting municipal waste under Section 129(e) of the CAA. See DEP Regulations Chapters 100, 104, 121, 140.

The Part 70 license requirements of 40 C.F.R. Part 70 are under revision due to litigation in which the State of Maine is a petitioner. Clean Air Act Implementation Project v. EPA, (D.C. Cir. , No. 92-1303 and consolidated cases). Maine therefore anticipates that future EPA rulemaking may result in new federal requirements concerning Part 70 licenses. The DEP has broad statutory authority which would allow promulgation of any additional state regulations required to comply with any such federal requirements. See 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-A(1), 341-D, 585-A, 590. Such regulations would be subject to EPA review as part of Maine's State Implementation Plan ("SIP"). See 40 C.F.R. Part 52.

EPA Region I has raised a concern that three state statutory provisions might allow noncompliance with "applicable requirements" of 40 C.F.R. Part 70: 1) the

variance provision in 38 M.R.S.A. § 587; 2) the requirement of an allowance for excess emissions during cold start-ups and shutdowns in 38 M.R.S.A. § 590(3); and 3) the 24-month installation period allowed by 38 M.R.S.A. § 590(6).

As far as this office can determine, DEP has never granted a variance under 38 M.R.S.A. § 587. If a license allowance contemplated by 38 M.R.S.A. § 590(3) is prohibited for a Part 70 source by the CAA, it is unforeseeable that DEP would include such an allowance in a Part 70 license since a prerequisite to such a license allowance is that it be "consistent with . . . applicable standards." See also DEP Regulations Chapter 140 § 3(E)(1). The 24-month installation period provision in 38 M.R.S.A. § 590(6) in effect creates a compliance schedule in much the same manner that Title V allows states to issue licenses to noncomplying sources that have submitted a schedule for achieving compliance in their license applications. Furthermore, the EPA 45-day veto provision would allow EPA to veto any inappropriate variance from CAA requirements should one ever be granted by DEP under 38 M.R.S.A. §§ 587, 590(3) or 590(6). See DEP Regulations Chapter 140 § 2 (L).

2. AUTHORITY TO ISSUE PART 70 LICENSES TO NONCOMPLYING SOURCES

State law does not prohibit the DEP from issuing Part 70 licenses to a source which is not in compliance with all applicable requirements, and to include compliance schedules in such a license, if a consent agreement or consent decree which addresses the violations and which includes such a schedule of compliance has been entered into.

Federal Authority: CAA §§ 502(b)(5)(A), 504(a), 42 U.S.C. §§ 7661a(b)(5)(A), 7661c(a); 40 C.F.R. §§ 70.5(c)(8), 70.6(c)(3).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 347-A(1), 585-A, and 590; DEP Regulations Chapters 100 and 140 §§ 2(B)(11) and 6(E)(3).

Remarks of the Attorney General:

Although federal law does not prevent DEP from exercising its discretion to deny a Part 70 license to any source, federal law requires that a schedule of compliance be part of any Part 70 license which DEP issues to a source which is not in compliance with all "applicable requirements" at the time of permit issuance. See 59 Fed. Reg. 44460 at 44520 (Aug. 29, 1994); CAA § 504(a); 40 CFR 70.5(c)(8)(iii)(C). Such a compliance schedule shall include

a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of

permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

40 C.F.R. § 70.5(c)(8)(iii)(C). EPA guidance indicates that most Part 70 licenses with a compliance schedule should be accompanied by a settlement of an enforcement action addressing violations of air quality laws. 59 Fed. Reg. 44460 at 44520 (Aug. 29, 1994). If a Part 70 source is in violation of Maine air quality laws, DEP regulations, or the terms or conditions of a license permit or order, DEP may resolve the violation through an administrative consent agreement approved by the Board and the Attorney General. See 38 M.R.S.A. § 347-A.

Maine law does not prohibit the DEP from issuing Part 70 licenses to a source which is not in compliance with all applicable requirements, and to include compliance schedules in such a Part 70 license, if a consent agreement or consent decree which addresses the violations and which includes such a schedule of compliance has been entered into. 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 347-A(1), 585-A, and 590; DEP Regulations Chapters 100 and 140 § 2(B)(11) and § 6(E)(3). Pursuant to 38 M.R.S.A. § 590(2), the DEP may impose appropriate and reasonable conditions as necessary to secure compliance with ambient air quality standards. If an air emission license renewal or amendment can be granted only if the licensee installs additional emission controls or other mitigating measures, then the licensee may continue to emit pollutants from air contaminant sources that will receive these controls or measures up to the same level allowed in its existing air emission license as long as the additional emission controls or mitigating measures are fully operational as soon as practicable but usually no later than 24 months after DEP issues the license renewal or amendment. See 38 M.R.S.A. § 590(6).

3. CONFLICTS OF INTEREST

State law provides that members of the State board or body, which approves Part 70 licenses both in the first instance and upon appeal, shall endeavor to avoid the appearance of a conflict of interest by disclosure or abstention.

Federal Authority: CAA §§ 128(a)(1)-(2), 129(e), 42 U.S.C. §§ 7428(a)(1)-(2), 7429(e); 40 C.F.R. § 70.4(b)(3)(iv).

Citation of State Laws and Regulations: 5 M.R.S.A. § 18; 5 M.R.S.A. § 12004-D; 38 M.R.S.A. §§ 341-A, 341-B, 341-C, 341-D(2), 344, 344-B; DEP Regulations Chapters 100, 104, 121, 140.

Remarks of the Attorney General:

Federal law requires that any board or body which approves licenses under the CAA, including Part 70 licenses under Title V of the CAA, "shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to licenses or enforcement orders" under the CAA. CAA § 128(a)(1)-(2). All Part 70 licenses, including Part 70 licenses for solid waste incineration units, are issued by either the Commissioner of DEP or the Board of Environmental Protection ("BEP"). See 38 M.R.S.A. §§ 341-A(4), 341-D(2), 344, 344-B; DEP Regulations Chapters 100, 104, 121, 140.

On its face, the Maine statutory requirement that members of the BEP "be chosen to represent the broadest possible interest and experience that can be brought to bear on the administration and implementation of [Title 38] and all other laws which the board is charged with administering" does not necessarily fulfill the federal requirement. See 38 M.R.S.A. § 341-C(2). The Board, however, is and traditionally has been composed of at least a majority of members who represent the broad public and do not derive any significant portion of their income from persons subject to licenses or enforcement orders under the CAA.

DEP employees and BEP members are further governed by the conflict of interest provisions of 5 M.R.S.A. § 18, which, *inter alia*, provide that DEP and BEP members shall endeavor to avoid even the appearance of a conflict of interest by disclosure or by abstention. Moreover, DEP and BEP members are subject to civil penalties if they personally and substantially participate in their official capacities in any proceeding in which, to their knowledge, any of the following have a direct and substantial financial interest: a) the individual, the individual's spouse or dependent children; b) the individual's partners; c) a person or organization with whom the individual is negotiating or has agreed to an arrangement concerning prospective employment; d) an organization in which the individual has a direct and substantial financial interest; or e) any person with whom the individual has been associated as a partner or a fellow shareholder in a professional corporation during the preceding year. 5 M.R.S.A. § 18(2).

Federal law also requires that no Part 70 license for a solid waste incinerator unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit. CAA §129(e), 42 U.S.C. §7429(e); 40 C.F.R. § 70.4(b)(3)(iv). We can foresee no circumstances under which the Commissioner of DEP or members of the BEP would be responsible, in whole or in part, for the design and construction or operation of a solid waste incinerator unit for which they were issuing a Part 70 license. See 38 M.R.S.A. §§ 341-A(4), 341-D(2), 344, 344-B; DEP Regulations Chapters 100, 104, 121, 140.

4. LICENSE FEES

State law provides legal authority for DEP to assess and collect annual license fees from all sources within the state which are subject to the requirements of Title V of the CAA and 40 C.F.R. Part 70, and to expend the money collected from annual air emission fees to pay for direct and indirect costs required to develop, administer, and enforce the Maine's Part 70 program.

Federal Authority: CAA § 502(b)(3)(A), 42 U.S.C. § 7661a(b)(3)(A); 40 C.F.R. §§ 70.9(a)-(d).

Citation of State Laws and Regulations: 38 M.R.S.A. §§ 351-354, 585-A; DEP Regulations Chapters 2 § 25 and 140 § 2(E).

Remarks of the Attorney General:

State law provides authority for DEP to collect annual air emission license fees from sources within the State subject to the Part 70 license program. 38 M.R.S.A. §§ 351-354; DEP Regulations Chapters 2 § 25 and 140 § 2(E).

DEP is required to assess annual license fees in an amount based upon the sum of all licensed allowable air pollutants, except for carbon monoxide. See § 353-A(1). The per ton annual fee ranges from \$5 per ton for licensees with up to 1,000 tons of licensed allowable emissions to \$15 per ton for licensees with over 4,001 tons of licensed allowable emissions. The Commissioner may adjust the per ton fees listed in 38 M.R.S.A. § 353-A(1) on an annual basis according to the United States Consumer Price Index established by the federal Department of Labor, Bureau of Labor Statistics. 38 M.R.S.A. § 353-A(2). Under Maine law the minimum annual fee is \$250 per year and the maximum annual fee is \$150,000 per year. 38 M.R.S.A. § 353-A(4).

Maine law also allows an annual fee surcharge of \$10 per every 1,000 air quality units as defined in 38 M.R.S.A. § 582(11-E) beginning November 1, 1994 with a minimum amount of \$100 per year and a maximum amount of \$50,000 per year. 38 M.R.S.A. §§ 353-A(1) and (4). 38 M.R.S.A. 582(11-E) defines "air quality units" as the result of the Department of Human Services' toxicity score for a hazardous air pollutant multiplied by the estimated emissions of that hazardous air pollutant.

DEP has authority to expend the collected annual air emission fees for all reasonable direct and indirect costs required to develop, administer and enforce the Maine's Part 70 program. 38 M.R.S.A. § 353-A (9) requires that money collected from the annual air emission fees be used solely for air pollution control activities. 38 M.R.S.A. § 352(2)(E) provides that "air emission license fees . . . must be assessed to support activities for the Bureau of Air Quality Control including licensing, compliance, enforcement, monitoring, data acquisition and administration."

Maine's proposed fee schedule is within the scope of 40 C.F.R. 70.9 (b) (3), under which a state has the flexibility both to use any combination of fees and to treat source categories differently in collecting fees to fulfill its program needs.

5. LICENSE TERM

State law provides authority to issue all Part 70 licenses for a fixed term not to exceed 5 years.

Federal Authority: CAA §§ 129(e), 408(a), 502(b)(5)(B), 42 U.S.C. §§ 7429(e), 7651g(a), 7661a(b)(5)(B); 40 C.F.R. §§ 70.4(b)(3)(iii)-(iv), 70.6(a)(2), 72.70(b), 72.72(a).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064, 38 M.R.S.A. §§ 341-D(1), 585-A, 590-A; DEP Regulations Chapter 140 § 2(R).

Remarks of the Attorney General:

Maine law requires that all Part 70 licenses, including those with acid rain provisions and those for solid waste incineration units combusting municipal waste subject to standards under CC § 129(e), have a term of five (5) years after the date of issuance. 5 M.R.S.A. §§ 8001-8064, 38 M.R.S.A. §§ 341-D(1), 585-A, 590-A; DEP Regulations Chapter 140 § 2(R).

6. MONITORING, RECORDKEEPING, AND REPORTING

State law provides authority to incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into Part 70 licenses consistent with 40 C.F.R. § 70.6. State law provides authority to incorporate into the Part 70 license periodic monitoring or testing requirements where the existing State Implementation Plan or other applicable requirement does not directly impose such a requirement, consistent with 40 C.F.R. § 70.6(a)(3)(i)(B).

Federal Authority: CAA §§ 502(b)(2), 503(b)(2), 504(a)-(c), 42 U.S.C. §§ 7661a(b)(2), 7661c(a)-(c); 40 C.F.R. §§ 70.4(b)(3)(ii), 70.6(a)(3), 70.6(c)(1), 70.6(c)(5).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 585-A, 589, 590; DEP Regulations Chapters 100, 117 and 140 §§ 2(C) and 3(E)(2).

Remarks of the Attorney General:

Maine law provides authority to incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into Part 70 licenses consistent with 40 C.F.R. § 70.6. 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 585-A, 589,

590; DEP Regulations Chapters 100, 117 and 140 §§ 2(C) and 3(E)(2). Maine law provides authority to incorporate into the Part 70 license periodic monitoring or testing requirements where the existing SIP or other applicable requirement does not directly impose such a requirement, consistent with 40 C.F.R. § 70.6(a)(3)(i)(B). 38 M.R.S.A. §§ 341-D(1), 585-A, 589, 590; DEP Regulations Chapter 140 § 3(E)(2).

7. INSPECTION/ENTRY AUTHORITY

State law provides authority to incorporate into Part 70 licenses inspection and entry requirements consistent with 40 C.F.R. § 70.6(c)(2).

Federal Authority: CAA § 504(c), 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(2).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 347-C, 585-A; DEP Regulations Chapters 2 § 16 and 140 § 2(V) and § 3(E)(7).

Remarks of the Attorney General:

Maine law provides authority to incorporate into Part 70 licenses inspection and entry requirements consistent with 40 C.F.R. § 70.6(c)(2). 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 347-C, 585-A; DEP Regulations Chapters 2 § 16 and 140 §§ 2(V) and 3(E)(7).

8. INCORPORATION OF ALL "APPLICABLE REQUIREMENTS" INTO LICENSES

State law provides authority to incorporate into a Part 70 license, upon issuance or renewal, all applicable requirements as defined in 40 C.F.R. § 70.2, and as provided generally in the CAA and 40 C.F.R. Part 70.

Federal Authority: CAA §§ 502(b)(5)(C), 504(a), 42 U.S.C. §§ 7661a(b)(5)(C), 7661c(a); 40 C.F.R. §§ 70.4(b)(3)(v), 70.6(a).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-A, 341-B, 341-D(1), 581, 582, 585, 585-A, 585-B, 590, 591; DEP Regulations Chapters 2, 100 through 140.

Remarks of the Attorney General:

Maine law provides authority to incorporate into a Part 70 license, upon issuance or renewal, all "applicable requirements" as defined in 40 C.F.R. § 70.2, and as provided generally in the CAA and 40 C.F.R. Part 70. 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-A, 341-B, 341-D(1), 581, 582, 585, 585-A, 585-B, 590, 591; DEP Regulations Chapters 2, 100 through 140; See DEP Regulations Chapter 140 § 3(E)(1)(a)(i). Maine's definition of "applicable requirements" consists of all the requirements listed in 40 C.F.R. § 70.2 and any requirement enforceable by EPA and

the citizens under the CAA that limit emissions for purposes of creating offset credits or for complying with or avoiding "applicable requirements." DEP Regulations Chapter 100 § 12.

Should additional regulatory authority be needed in order to comply with federal law concerning any of the "applicable requirements," DEP has broad statutory authority which would allow promulgation of any additional state regulations required by EPA. See 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590. Such regulations would be subject to EPA review as part of Maine's SIP. See 40 C.F.R. Part 52.

9. REOPENING OF PART 70 LICENSES

State law provides authority to terminate, modify, or revoke licenses for cause at any time during the license term, consistent with 40 C.F.R. §§ 70.7(f) and (g). State law provides authority to reopen Part 70 licenses when additional acid rain requirements become applicable, regardless of the remaining license term. State law provides authority to revise all other Part 70 licenses with remaining terms of three or more years to incorporate new "applicable requirements" which become effective after issuance of the Part 70 license.

Federal Authority: CAA §§ 502(b)(5)(D), 502(b)(9), 42 U.S.C. §§ 7661a(b)(5)(D), 7661a(b)(9); 40 C.F.R. §§ 70.4(b)(3)(vi), 70.6(a)(6)(iii), 70.7(f)-(g).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590; DEP Regulations Chapters 100 and 140 §§ 2(N), 2(O), 3(E)(7)(21).

Remarks of the Attorney General:

Maine law provides authority to terminate, modify, or revoke licenses for cause at any time during the license term, consistent with 40 C.F.R. §§ 70.7(f) and (g). 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590; DEP Regulations Chapter 100, 140 §§ 2(N), 2(O), 3(E)(7)(21); 59 Fed. Reg. 44460 at 44520-44521 (Aug. 29, 1994). DEP Regulations Chapter 140 § 3(E)(7)(21)(a).

Maine law provides authority to reopen Part 70 licenses when additional acid rain requirements become applicable, regardless of the remaining license term. DEP Regulations Chapter 140 § 3(E)(7)(21)(b). Maine law provides authority to revise all other Part 70 licenses with remaining terms of three or more years to incorporate new "applicable requirements" which become effective after issuance of the Part 70 license. Pursuant to 38 M.R.S.A. § 341-D(3)(E), after written notice and opportunity for a hearing, one of the circumstances under which the Board of Environmental Protection may modify any license when it finds that "[t]here has been a change in

any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license." The phrase "a change in any condition or circumstance that requires [modification of the license]" includes those circumstances under which the laws or regulations administered by the United States Environmental Protection Agency require a license modification.

10. OPERATIONAL FLEXIBILITY

State law provides authority to issue Part 70 licenses which allow changes within a permitted facility without requiring a Part 70 license amendment under certain conditions. State law provides authority for sources to include alternative operating scenarios in Part 70 licenses.

Federal Authority: CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10); 40 C.F.R. §§ 70.4(b)(12), 70.6(a)(9).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 585-A, 590 and 591-A; DEP Regulations Chapter 140 § 2(J).

Remarks of the Attorney General:

Maine law provides operational flexibility in Part 70 licenses by allowing specified changes to be made by sources, including the use of alternative operating scenarios which are specifically identified in the part 70 license, without requiring a license amendment. DEP Regulations Chapter 140 § 2(J).

The operational flexibility provisions of 40 C.F.R. Part 70 are under revision due to litigation in which the State of Maine is a petitioner. Clean Air Act Implementation Project v. EPA, (D.C. Cir. , No. 92-1303 and consolidated cases). Maine therefore anticipates future EPA rulemaking may result in new federal requirements concerning operational flexibility in Part 70 licenses. DEP has broad statutory authority which would allow promulgation of any additional state regulations required to comply with any such federal requirements. See 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590. Such regulations would be subject to EPA review as part of Maine's SIP. See 40 C.F.R. Part 52.

11. LICENSE MODIFICATIONS

State law provides authority to process Part 70 license modifications in a manner that is substantially equivalent to the procedures set forth under 40 C.F.R. § 70.7(e).

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 C.F.R. §§ 70.4(b)(13), 70.7(e).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590, and 591-A; DEP Regulations Chapters 100, 140 §§ 5(B), 7, 8, 9, 10.

Remarks of the Attorney General:

Maine law provides authority to process Part 70 license modifications in a manner that is substantially equivalent to the procedures set forth under 40 C.F.R. § 70.7(e). DEP Regulations Chapters 100, 140 §§ 5(B), 7, 8, 9, 10.

The license modification provisions of 40 C.F.R. Part 70 are under revision due to litigation in which the State of Maine is a petitioner. Clean Air Act Implementation Project v. EPA, (D.C. Cir. , No. 92-1303 and consolidated cases). Maine therefore anticipates future EPA rulemaking may result in new federal requirements concerning in Part 70 license modifications. DEP has broad statutory authority which would allow promulgation of any additional state regulations required to comply with any such federal requirements. See 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590. Such regulations would be subject to EPA review as part of Maine's SIP. See 40 C.F.R. Part 52.

12. **PUBLIC PARTICIPATION**

State law provides authority supporting public participation in DEP's decisionmaking process concerning the issuance, denial, modification or renewal of a Part 70 license. Public participation under State law includes the opportunity for public comment and the opportunity for a hearing on Part 70 draft licenses in accordance with the requirements of the CAA and 40 C.F.R. § 70.7(h). State law allows affected States to review Part 70 license applications in accordance with the CAA and 40 C.F.R. § 70.8(b).

Federal Authority: CAA §§ 502(b)(6), 505(a)(2), 42 U.S.C. §§ 7661a(b)(6), 7661d(a)(2); 40 C.F.R. §§ 70.7(h), 70.8(b).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 344 and 345-A, 585-A; DEP Regulations Chapters 2, 20, 30, 100, 140 §§ 2(D), 2(K), 2(M), 3(G), 5(A)(7), 5(B)(7), 6(G), 8(G) and 9(G).

Remarks of the Attorney General:

Maine law allows the public and affected States to review and comment on Part 70 license applications and Part 70 draft licenses in accordance with the CAA and 40 C.F.R. § 70.8(b). See DEP Regulations Chapters 2, 20, 30, 100, 140 §§ 2(D), 2(K), 2(M), 3(G), 5(A)(7), 5(B)(7), 6(G), 8(G) and 9(G). An "affected state" for purposes of the Part 70 Program may include New Hampshire, Massachusetts and Vermont. DEP Regulations Chapter 100 § 5,

13. PUBLIC ACCESS TO LICENSE INFORMATION

State law makes available to the public any Part 70 license application, compliance plan, license, and monitoring and compliance certification report, except for information by law entitled to confidential treatment. State law provides that the contents of a Part 70 license shall not be entitled to confidential treatment.

Federal Authority: CAA §§ 114(c), 502(b)(8), 503(e), 42 U.S.C. §§ 7414(c), 7661a(b)(8) 7661b(e); 40 C.F.R. § 70.4(b)(3)(viii).

Citation of State Laws and Regulations: 1 M.R.S.A. §§ 401-410; 5 M.R.S.A. §§ 401-410; 5 M.R.S.A. §§ 8001-8064; 9057(6); 5 M.R.S.A. § 12003-A(5); 10 M.R.S.A. § 1542(4); 38 M.R.S.A. §§ 341-D(1), 344(4-A), 585-A; Me.R. Evid. 507; DEP Regulations Chapter 140 § 2(U).

Remarks of the Attorney General:

Maine law makes available to the public any Part 70 license application, compliance plan, license, and monitoring and compliance certification report, except for information by law entitled to confidential treatment. 1 M.R.S.A. §§ 401-410; 5 M.R.S.A. §§ 401-410; 5 M.R.S.A. §§ 8001-8064; 9057(6); 5 M.R.S.A. § 12003-A(5); 10 M.R.S.A. § 1542(4); 38 M.R.S.A. §§ 341-D(1), 344(4-A), 585-A; Me.R. Evid. 507; DEP Regulations Chapter 140 § 2(U). State law provides that the contents of a Part 70 license shall not be entitled to confidential treatment. DEP Regulations Chapter 140 § 2(U)(2).

14. ENFORCEMENT OF PART 70 PROGRAM REQUIREMENTS

State law provides civil and criminal enforcement authority to address Part 70 program violations consistent with 40 C.F.R. § 70.11, including authority to seek injunctive relief and to recover penalties and fines in a maximum amount of not less than \$10,000 per day per day per violation.

Federal Authority: CAA § 502(b)(5)(E), 42 U.S.C. § 7661a(b)(5)(E); 40 C.F.R. §§ 70.4(b)(3)(vii), 70.11.

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 191, 10051(1); 17-A M.R.S.A. §§ 34, 35 and 1252; 38 M.R.S.A. §§ 343-C, 347-A, 348 and 349.

Remarks of the Attorney General:

Consistent with 40 C.F.R. § 70.11(a)(1), DEP has enforcement authority to restrain any person from engaging in any activity in violation of a Part 70 license that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment. See 38 M.R.S.A. § 347-A(3), 347-A(5) and 348(1). Consistent with 40 C.F.R. § 70.11(a)(2), State law also provides authority to seek injunctive relief in court to enjoin any violation of any Part 70 Program requirement, including permit conditions, without the necessity of a prior revocation of the Part 70 license. 38 M.R.S.A. § 348.

Maine law provides civil enforcement authority consistent with 40 C.F.R. § 70.11(3)(i), including authority to recover civil penalties and fines in a maximum amount of not less than \$10,000 per day per violation for the violation of any applicable requirement, any permit condition, any fee or filing requirement, any duty to allow or carry out inspection, entry or monitoring activities or any regulation or orders issued by DEP. 38 M.R.S.A. §§ 349(2) and 349(8). See DEP v. Emerson, 616 A.2d 1268, 1271-72 (Me. 1992).

Maine statutes also provide criminal enforcement authority consistent with 40 C.F.R. § 70.11(3)(ii) & (iii), including authority to recover penalties and fines in a maximum amount of not less than \$10,000 per day per violation against any person who knowingly violates any applicable requirement, any permit condition, or any fee or filing requirement; knowingly makes any false, material statement, representation or certification in any form, notice or report required by a license; or who knowingly renders inaccurate any required monitoring device or method. 38 M.R.S.A. §§ 349(1) and 349(3); 17-A M.R.S.A. §§ 34 and 35. See DEP v. Emerson, 616 A.2d at 1271-72.

The burden of proof and degree of knowledge or intent required under State law for establishing violations is no greater than the burden of proof or degree of knowledge or intent required under the Clean Air Act. The standard used in the Clean Air Act for criminal liability is "knowingly." See 17-A M.R.S.A. §§ 34 and 35; 38 M.R.S.A. § 349(1). The degree of knowledge or intent required by 38 M.R.S.A. § 349(1) is no greater than "knowingly" for criminal violations, and state law does not include mental state as an element of proof for civil violations brought under 38 M.R.S.A. § 349(2); 17-A M.R.S.A. § 34(5); See DEP v. Emerson, 616 A.2d at 1270.

Consistent with 40 C.F.R. § 70.11(c), Maine law provides adequate authority to assess, seek, or agree upon civil and criminal penalties which are appropriate to the violation. See 38 M.R.S.A. §§ 343-C, 347-A(1) and 349; 17-A M.R.S.A. §§ 34, 35 and 1252; BAQC Penalty Assessment Guideline (1994); DEP v. Emerson, 616 A.2d at 1271-72.

15. AUTHORITY TO ENFORCE PART 70 LICENSES AFTER END OF LICENSE TERM

State law provides authority to enforce the terms and conditions of a Part 70 license which would have otherwise expired in cases where the Part 70 source has filed a timely and complete application for renewal but the DEP has not yet acted upon that application.

Federal Authority: CAA § 502(b)(5)(A), 42 U.S.C. § 7661a(b)(5)(A); 40 C.F.R. § 70.4(b)(10).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064, 10002; 38 M.R.S.A. §§ 341-D(1), 585-A; DEP Regulations Chapter 140 §§ 2(F) and 2(S).

Remarks of the Attorney General:

Maine has the authority to enforce terms and conditions of a Part 70 license after the end of the license term if the source has filed a timely and sufficient application for renewal of the Part 70 license. See 5 M.R.S.A. §§ 8001-8064, 10002; 38 M.R.S.A. §§ 341-D(1), 585-A; DEP Regulations Chapter 140 §§ 2(F) and 2(S).

16. EPA LICENSE VETO

State law provides that a Part 70 license will not issue if the Administrator of EPA (or her designee) objects in a timely manner to its issuance pursuant to 40 C.F.R. § 70.8(c) or, if the Part 70 license has been issued, but the Administrator or her designee objects pursuant to 40 C.F.R. 70.8(d).

Federal Authority: CAA §§ 502(b)(5)(F), 505(b), 42 U.S.C. §§ 7661a(b)(5)(F), 7661d(b); 40 C.F.R. §§ 70.4(b)(3)(ix), 70.8(c)-(d).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-8064; 38 M.R.S.A. §§ 341-D(1), 344(2-B), 585-A, and 590; DEP Regulations Chapter 140 §§ 2(L) and 2(M).

Remarks of the Attorney General:

Maine law provides that a Part 70 license will not issue if the Administrator of EPA (or her designee) objects in a timely manner to its issuance pursuant to 40 C.F.R. § 70.8(c) or, if the Part 70 license has been issued, but the Administrator or her designee objects pursuant to 40 C.F.R. 70.8(d). See DEP Regulations Chapter 140 §§ 2(L) and 2(M).

17. JUDICIAL REVIEW OF AGENCY FAILURE TO ACT

State law provides that any aggrieved party may obtain judicial review in State court for the failure of DEP to take final action on an application for a Part 70 license, license renewal, or license revision.

Federal Authority: CAA § 502(b)(7), 42 U.S.C. § 7661a(b)(7); 40 C.F.R. § 70.4(b)(3)(xi).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 11001 and 11002; 38 M.R.S.A. §§ 344, 344-B, 585-A; Maine Rules of Civil Procedure 80-B and 80-C.

Remarks of the Attorney General:

Maine law provides that any aggrieved party may obtain judicial review in Superior Court for the failure of DEP to take final action on an application for a Part 70 license, license renewal, or license revision. 5 M.R.S.A. §§ 11001 and 11002; 38 M.R.S.A. §§ 344, 344-B, 585-A; Maine Rules of Civil Procedure 80-B and 80-C.

18. DEFAULT LICENSE ISSUANCE

State law does not authorize the issuance, modification, or renewal of any Part 70 license merely because of the passage of a specified time period when DEP has failed to take action on the Part 70 application; nor does State law include any provision providing for default issuance of a Part 70 license.

Federal Authority: CAA § 505(a)-(e), 42 U.S.C. § 7661d(a)-(e); 40 C.F.R. § 70.8(e).

Citation of State Laws and Regulations: 38 M.R.S.A. §§ 344, 344-B, 585-A, 590, 591; DEP Regulations Chapters 115 and 140 §§ 2(E-H) and 2(S).

Remarks of the Attorney General:

A person may not operate, maintain or modify any Part 70 source without a current Part 70 license unless that source is exempted from licensing pursuant to DEP regulations. 38 M.R.S.A. §§ 590 and 591; DEP Regulations Chapters 115 and 140. When a licensee has made timely and sufficient application for renewal of a license, the existing license does not expire until the application has been finally determined by DEP. 5 M.R.S.A. § 10002; DEP Regulations Chapter 140 §§ 2(F) and 2(S). Maine law does not authorize the issuance, modification, or renewal of any Part 70 license merely because of the passage of a specified time period when DEP has failed to take action on the Part 70 application; nor does Maine law include any provision providing for default issuance of a Part 70 license. 38 M.R.S.A. §§ 344, 344-B, 585-A, 590, 591; DEP Regulations Chapters 115 and 140 §§ 2(E-H) and 2(S).

The only "default" provision governing Maine's air licensing process is 38 M.R.S.A. § 344(1), which requires the Commissioner to notify the applicant in writing of the official date on which the license application was accepted as complete for processing or the reasons the application was not accepted. If a written notice of acceptance or nonacceptance is not mailed to the applicant within 15 working days of receipt of application, the application is deemed to be accepted as complete for processing on the 15th working day after receipt by DEP. 38 M.R.S.A. § 344(1); DEP Regulations Chapter 140 § 2(E). Deeming an application as complete for review does not constitute a determination by DEP on the sufficiency of that information, does not preclude DEP from requesting additional information during processing, and does not authorize the issuance, modification or renewal of the license based upon the passage of a specified time. See 38 M.R.S.A. §§ 344(1), 344-B; DEP Regulations Chapter 140 §§ 2(G-H). Failure of DEP to act on a license application within the time allotted in the processing timetable established pursuant to state law does not authorize the applicant to proceed as if the license had been granted, nor does such failure to act authorize the courts to grant the license. See D & J Associates v. Board of Environmental Protection, 560 A.2d 4, 4 (Me. 1989); 38 M.R.S.A. §§ 344, 344-B(1) or DEP Regulations Chapter 140 §§ 2(H).

19. OPPORTUNITY FOR JUDICIAL REVIEW OF LICENSE ACTIONS

State law provides any person who is aggrieved by a final Part 70 license action an opportunity for judicial review in State court. Any provisions of State law which limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.4(b)(3)(x).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 11001-11008; 38 M.R.S.A. §§ 344(2-A), 346(1) and 347-A, 585-A; DEP Regulations Chapter 2 § 21(D); Maine Rules of Civil Procedure 80-B and 80-C.

Remarks of the Attorney General:

Maine law provides any person who is aggrieved by a final Part 70 license action an opportunity for judicial review in Superior Court. 5 M.R.S.A. §§ 11001-11008; 38 M.R.S.A. §§ 344(2-A), 346(1) and 347-A, 585-A; DEP Regulations Chapter 2 § 21(D).

Any provisions of Maine law which limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution. To have standing to obtain judicial review of an administrative action under Maine law, a person must demonstrate a particularized injury or potential for particularized injury as the

result of that administrative action. See In re Lappie, 377 A.2d 441, 442-43 (Me. 1977); In re International Paper Co., 363 A.2d 235, 238-39 (Me. 1976) (for purposes of standing, particularized injury affecting members of environmental and public interest groups residing and breathing the air in the region arose by virtue of their "use" of air in the area likely to be affected by proposed environmental permit). Provided that the person seeking review is among the injured, harm to aesthetic, environmental or recreational interests may be sufficient to confer standing. See Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 196-97 (Me. 1978) (citing Sierra Club v. Morton, 405 U.S. 727 (1972) (plaintiffs who were users of State park and who intended to use it in the future had standing to enjoin Park Authority from clearing timber blowdown).

20. LIMITATIONS ON JUDICIAL REVIEW

State law provides that petitions for judicial review of a Part 70 licensing action must be filed within 30 days after receipt of notice of the final license action if appeal is taken by a party to the Part 70 license proceeding. Any other person aggrieved shall have 40 days from the date the decision was rendered to petition for review. State law further provides that if the Part 70 license action being challenged is DEP's failure to take final action, a petition for judicial review may be filed within 6 months of the expiration of the time within which DEP's final agency action concerning the Part 70 license should reasonably have occurred.

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.4(b)(3)(xii).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 11001-11008; 38 M.R.S.A. §§ 341-D(5), 346, 585-A, 590 and 591-A. DEP Regulations Chapters 2, 140 § 2(H); Maine Rules of Civil Procedure 80-B and 80-C.

Remarks of the Attorney General:

Maine law provides that petitions for judicial review of a Part 70 licensing action in Superior Court must be filed within 30 days after receipt of notice of the final license action if appeal is taken by a party to the Part 70 license proceeding. See M.R.S.A. §§ 11001-11002. Any other person aggrieved shall have 40 days from the date the decision was rendered to petition for review in Superior Court. Id. Maine law does not allow petitions for judicial review based on grounds arising after the foregoing 30 and 40 day deadlines for judicial review. See Post v. State, 605 A.2d 81, 82 (Me. 1992) (citing Brown v. State Department of Manpower Affairs, 426 A.2d 880, 887-88 (Me. 1981)).

Maine law also provides that if the Part 70 license action being challenged is DEP's failure to take final action, a petition for judicial review may be filed in Superior Court within 6 months of the expiration of the time within which DEP's final agency action concerning the Part 70 license should reasonably have occurred. See 5 M.R.S.A. §§ 11001 and 11002(3).

The six-month time limit under 5 M.R.S.A. § 11002(3) might appear to be inconsistent with 40 C.F.R. § 70.4(b)(3)(xii) which requires the State Part 70 Program to allow a petition for judicial review to be filed any time before the permitting authority denies the permit or issues the final permit. However, so long as the permit application remains pending with the agency, we would ordinarily consider the DEP to be under a continuing obligation to act upon it. Therefore, it is difficult to conceive of an eventuality under which the six-month time period for an appeal would expire if the applicant were to seek judicial review of a failure to act upon a still pending permit application.

21. COORDINATION WITH ACID RAIN PROGRAM REQUIREMENTS

State law concerning Part 70 sources is consistent with the Acid Rain Program requirements of 40 C.F.R. Part 72.

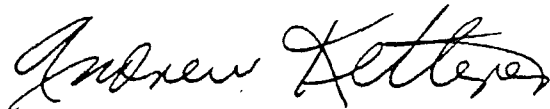
Federal Authority: CAA §§ 408(a), 506(b), 42 U.S.C. §§ 7651g(a), 7661e(b); 40 C.F.R. §§ 70.4(b)(3)(xiii), 72.70(b), 72.72(a).

Citation of State Laws and Regulations: 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590; DEP Regulations Chapter 100 §§ 12(F), 147 and 148, Chapter 140 §§ 1(B)(5) and 4.

Remarks of the Attorney General:

Maine law requires that Clean Air Act Title IV (Acid Rain) sources located in Maine obtain a Part 70 license. DEP Regulations Chapters 100 §§ 147 and 148, 140 § 1(B)(5). In DEP Regulations Chapter 140 § 4, Maine adopted and incorporated by reference the provisions of 40 C.F.R. Part 72 as in effect on January 11, 1993 and as amended March 23, 1993. DEP has broad statutory authority which would allow promulgation of any additional state regulations required to comply with future EPA Acid Rain Program rulemaking. See 5 M.R.S.A. §§ 8001-11008; 38 M.R.S.A. §§ 341-D, 585-A, 590. Such regulations would be subject to EPA review as part of Maine's SIP. See 40 C.F.R. Part 52.

Sincerely,



ANDREW KETTERER
Attorney General
State of Maine
Six State House Station
Augusta, Maine 04333