Presented below are water quality standards that are in effect for Clean Water Act purposes.

EPA is posting these standards as a convenience to users and has made a reasonable effort to assure their accuracy. Additionally, EPA has made a reasonable effort to identify parts of the standards that are not approved, disapproved, or are otherwise not in effect for Clean Water Act purposes.

JAMES E. TIERNEY
ATTORNEY GENERAL

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
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January 29, 1990

Tonia D. Bandrowicz
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United States Environmental Protection Agency
Region I
JFK Federal Building
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RE: 38 M.R.S.A. §467(1)(A)(2) and §467(7)(A)(3).

Dear Toni:

This is a response to your letter dated May 11, 1989 in which you ask whether this office agrees with EPA's interpretation of the above statutes, as set forth in your May 21, 1987 letter to the Maine DEP.

38 M.R.S.A. §467(1)(A)(2), in pertinent part, states:

> The Legislature recognizes . . . that at certain times portions of the waters in the impoundments created by Gulf Island, Deer Rips and Lewiston Falls dams have not and may continue to not meet the Class C requirements . . . The Legislature further recognizes that, for the purposes of this subparagraph, these impoundments constitute a valuable indigenous and renewable energy resource for hydroelectric energy which provide a significant contribution to the economic development and general welfare of the citizens of the State. Accordingly, the value and importance to the people of the

> State of hydroelectric energy and the unavoidable consequences to water quality resulting from the existence of these impoundments shall be considered when the Board determines the impact of a discharge on the designated uses of the impoundments identified in this paragraph. The impoundments shall be considered to meet their classification if the Department finds that conditions in those impoundments are not preventing their designated uses from being reasonable attained. Nothing in this paragraph may be construed to limit the Board's authority to consider the requirements of §414-A, sub-§1, paragraphs A to E. (Emphasis added).[1/]

1/ Section 414-A, in pertinent part, states:

> The Board shall issue a license for the discharge of pollutants only if it finds that:
>
> A. The discharge either by itself or in combination with other discharges will not lower the quality of any classified body of water below such classification; . . .
>
> C. The discharge either by itself or in combination with other discharges will not lower the existing quality of any body of water, unless, following opportunity for public participation, the Board finds that the discharge is necessary to achieve important economic or social benefits to the State and when the discharge is in conformance with §464, subsection 4, paragraph F. The finding must be made following procedures established by rule of the Board pursuant to §464, subsection 4, paragraph F; * * *

Section 464(4)(F) is, of course, the statute setting forth the State's antidegradation policy, and has recently been amended to conform with the EPA's request.

As stated in your May 21, 1987 letter to DEP, the federal regulations require the full protection of a classification's designated uses, not reasonable attainment thereof. This appears to be consistent with DEP's interpretation of §467.

The last line of §467(1)(A)(2), the identical language in (7)(A)(3), and §414-A(1)(C), when read together, clearly indicate the Legislature's intent that the Board retain its authority to issue a waste discharge license only if it finds that the discharge, either by itself or in combination with other discharges, will not lower the existing quality of any water body, unless, following opportunity for public participation, the Board finds that the discharge is necessary to achieve important economic or social benefits.

Indeed, as you know 40 C.F.R. §131.10(g) allows the State to adopt subcategories of an existing classification's uses after showing through a use attainability analysis that the attainment of the designated uses is not feasible because, for instance, "dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use." 40 C.F.R. §131.10(g)(4).

In its interpretation of 38 M.R.S.A. §§467(1)(A)(2), (7)(A)(3) and 414-A(1) DEP has taken the position that no subcategory an be created without first performing a use attainability analysis and that the pertinent language for §467

merely indicates the Legislature's intent to create subcategories.[2/]

Furthermore, DEP has indicated to both the EPA and this office that their interpretation of §§467(1)(A)(2) and (7)(A)(3) is that the provisions in question merely state the intent of the Legislature to create subcategories of the existing classifications's uses and assign criteria specific to those impoundments pursuant to 40 C.F.R. §131.10 only after it has conducted the required studies following the procedures set forth in 40 C.F.R. §131.10. This interpretation is, therefore, consistent with federal law.

Nevertheless, the argument that the law creates a subcategory for certain impoundments on the Androscoggin or Penobscot Rivers is not without foundation. The language of the statute and its legislative history indicate the social and economic benefits derived from hydroelectric energy and the

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2/ Indeed, rather than attempt to establish a subcategory for certain impoundments, DEP has, for example, required in its draft licenses for Boise Cascade and International Paper that each facility operate a side stream oxygenation system to inject oxygen into Gulf Island Pond to insure that no less than 85% of the volume of the impoundment will experience dissolved oxygen levels above 5.0 ppm at any time. Clearly, DEP is attempting to enforce the full protection of Class C designated uses in this impoundment.

unavoidable consequence to the impoundments.[3/] While there is a possibility that the words "reasonably attained" establish something less than "full protection" of the designated uses for the impoundments, such an interpretation would violate federal law. Reading §§467 and 414-A together, there is sufficient support for the Department's interpretation that §§467(1)(A)(2) and (7)(A)(3) merely reflect the Legislature's intent to create subcategories pursuant to 40 C.F.R. §131.10, and that, indeed, no such subcategories exist without resort to the procedures set forth is §131.10. Such an interpretation is in harmony with federal law.

Best regards,

JON H. EDWARDS
Assistant Attorney General

JHE/asw

cc: Dean Marriott
Steve Groves
Tim Glidden
Jeffrey Pidot

3/ See "Water Reclassification Report of the Joint Standing Committee on Energy and Natural Resources," March, 1986.