A STATE APPROACH TO EFFLUENT CHARGE*

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INTRODUCTION

Although the concept of effluent charge as a means of dealing with water pollution has been widely discussed in this country for more than a decade[1] and widely used with documented success in parts of Europe for over fifty years,[2] there is a surprising lack of specific material on methods of implementation. We are, after all, a complex society with overlaying levels of government and close working relationships between the public and private sectors of the economy. Furthermore, the statutory, constitutional, and institutional framework of the federal government and that of each state government are different in varying degree from one another. Thus, the most persuasive and useful plan must, if it is to become the basis for action, be translated into a set of working arrangements which take cognizance of the existing constitutional, statutory, and institutional arrangements in a particular jurisdiction. The purpose of this paper is to propose a working set of arrangements for Maine. To the extent that the paper succeeds in outlining specific approaches which would enable effluent charges to be levied and used in Maine, its more general utility may be limited. However, to the extent that it is a general principle which is sought to be adapted in this State and that the constitutions and pollution control statutes of the several states are more similar than dissimilar, the approaches outlined may, with minor

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[1] *See, e.g.*, A. KNEESE, THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT (1964); A. KNEESE & B. BOWER, MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS (1968); V. PRAKASH & R. MORGAN, ECONOMIC INCENTIVES AND WATER QUALITY MANAGEMENT PROGRAMS 39-71 (Water Resources Center, Univ. of Wis., 1969); Grady, *Effluent Charges and the Industrial Water Pollution Problem*, 5 NEW ENG. L. REV. 61 (1969).

[2] A. KNEESE, THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT 160-87 (1964).

modification, be useful in other jurisdictions. Certainly the discussion of specific implementation proposals will do much to advance both an understanding of the concept and the eventual development of rationale and politically acceptable implementation models.[3]

For nearly thirty years, Maine has made some efforts at water pollution control,[4] although it is only in the last several years that these efforts could be termed meaningful. The State has classified almost all of its waters[5] and has committed itself to a timetable for the construction of waste water treatment plants aimed at achieving these water quality classifications by 1976.[6] Two major bond issues of $25 and $50 million have recently been passed[7] to enable the State to meet its share of these construction costs.[8] Moreover, the State recently has embarked on an ambitious program of prefunding[9] the federal share of treatment plant construction costs.[10] In spite of these efforts, there is a nagging feeling that the State will not meet its 1976 goals, that efforts will again be made to postpone the timetable deadlines,[11] and that more stringent approaches to water pollution control may be necessary.

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[3] For a discussion of effluent charge at the federal level, see S. 3181, 91st Cong., 1st Sess. (1969); and *Hearings on S. 3181 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. pt. 1, at 187-242 (1970). This bill, introduced by Senator Proxmire, received nationwide publicity, *e.g.*, Wicker, *Let the Polluters Pay*, N.Y. Times, Nov. 27, 1969, at 28, col. 5. President Nixon acknowledged the problem of water pollution and the concept of effluent charge which would shift the costs of pollution control in whole or in part back onto the polluter in his 1970 State of the Union Message and in a subsequent Environmental Message to Congress. Address by Richard M. Nixon to 91st Cong., 2d Sess., Jan. 22, 1970, in 116 CONG. REC. 738, 739-40 (1970), and Message from Richard M. Nixon to 91st House of Reps., 2d Sess., Feb. 10, 1970, in 116 CONG. REC. 3132-33 (1970).

[4] For a history of water pollution control in Maine, see Delogu, *Effluent Charges: A Method of Enforcing Stream Standards*, 19 MAINE L. REV. 29, 31-38 (1967).

[5] ME. REV. STAT. ANN. tit. 38, §§ 367-71 (Supp. 1970), 372 (1964).

[6] ME. REV. STAT. ANN. tit. 38, § 451(1) (Supp. 1970).

[7] A twenty-five million dollar bond issue was authorized in 1964. Ch. 235, [1965] Me. Priv. & Spec. Laws 95 (101st Leg., 2d Spec. Sess.). A subsequent bond issue of fifty million dollars was authorized in 1969. Ch. 181, [1969] Me. Priv. & Spec. Laws 1950-52.

[8] ME. REV. STAT. ANN. tit. 38, § 411(1) (Supp. 1970).

[9] ME. REV. STAT. ANN. tit. 38, § 411(2) (Supp. 1970).

[10] 33 U.S.C. § 466e (Supp. V, 1970).

[11] The earliest enforcement schedules established a timetable for the cleanup of certain waters which called for preliminary steps to be completed as early as 1964 with a target date for completed waste water treatment plant construction of 1976. Ch. 330, [1961] Me. Laws 532-33. Later schedules maintained the final target date of 1976 but the preliminary steps did not have to be completed until 1969. Ch. 475, § 7, [1967] Me. Laws 778. The pushing back of the time in which to complete preliminary steps will make final project completion by the 1976 deadline difficult if not impossible.

In an earlier paper, the author suggested that effluent charges could be an important enforcement mechanism in achieving stream standards.[12] The central thesis of that paper and an underlying premise of this paper is that effluent charges in each major watershed or river system must be measured by and allocated to the construction costs (including capital, operating, maintenance, and replacement costs) of those waste water treatment facilities necessary to achieve the stream standards imposed.[13] A uniform national effluent charge as proposed in Senator Proxmire's bill[14] or even a uniform state effluent charge as proposed in a bill presented to the 105th Maine Legislature[15] is, in spite of its simplicity and ease of administration, an unwise approach. A uniform approach cannot possibly take into account the variations in the physical characteristics of the waterbody into which the effluent is discharged, such as its size, rate of flow, and annual and seasonal variation in flow and temperature. Therefore, in the great majority of cases, a uniform effluent charge will result either in an overcharge where more money is collected than is necessary to achieve the degree of pollution control desired,[16] or in an undercharge where not enough money is collected either to deter effec-

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[12] Delogu, *Effluent Charges: A Method of Enforcing Stream Standards*, 19 MAINE L. REV. 29, 39-47 (1967). This paper extensively described the economic dislocations which arise when some producers can shift a cost of production onto others, the economist's response in the form of transfer payments, and the corrective results in terms of economic readjustment and pollution control which effluent charge is capable of producing.

[13] *Id.* at 42-47.

[14] *See* note 3 *supra.*

[15] This bill, L.D. 1450 (105th Me. Leg.), unfortunately weak in some respects, was conceived by Professor Myrick Freeman of Bowdoin College, Brunswick, Maine. Much of the drafting of the legislation was done by Arthur D. Dolloff, Esquire. It was originally sought to be presented to the Maine Legislature by an initiative proceeding pursuant to ME. CONST. art. IV, pt. 3, § 18. When the initiative failed, it was subsequently introduced by Rep. George Vincent, Jr. of Portland. It was given a public hearing by the Natural Resources Committee of the legislature, received an "ought not to pass" report and, though sought to be amended in several ways to meet legislative objections, was defeated in both houses by substantial margins. The worth of the effort, however, ought not to go unrecognized. The initiative effort coupled with the public hearing served to educate a substantial segment of the public and, more importantly, of the legislature to the concept and need for an effluent charge approach to water pollution control. There was, notwithstanding the bill's defeat, considerable legislative support. Both the Governor's Office and the Environmental Improvement Commission were persuaded not to oppose the bill and to adopt a "wait and see" and "further study" attitude towards the issue. Future attempts to enact an effluent charge, hopefully with a more complete and stronger bill, have been made considerably easier by this threshold effort.

[16] In light of the avowed purpose of an effluent charge, this overcharge may be considered a "taking" of property. *Cf.* Norwood v. Baker, 172 U.S. 269, 278-79 (1898).

tively the discharge of wastes into receiving waterbodies or to treat those wastes discharged so as to achieve the degree of pollution control desired.[17] Uniform effluent charges set high enough to avoid the "license to pollute" criticism will almost certainly meet the overcharge criticism and vice versa. Only in those comparatively few situations where the uniform charge fortuitously corresponds with the actual costs of dealing with the pollutant loads discharged into a particular waterbody will it in fact be an equitable tool. Thus, an individualized watershed or river system approach to water resources management is preferable.[18]

A last point which should be made with respect to the premises of the legislative approach herein suggested is that effluent charges, rather than calling for repeal of any existing water pollution control laws or the machinery to implement these laws, can and should be seen as a complementary enforcement mechanism to existing laws and institutions. In fact, effluent charges will be most effective if integrated with existing laws and institutions and in no way represent an abandonment of the pollution control efforts and approaches of the past several years.[19]

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[17] This would almost certainly, and quite correctly, be characterized as a "license to pollute." *Hearings on S. 3181 Before Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., pt. 1, at 192-93, 233 (1970).

[18] *See* FEDERAL WATER POLLUTION CONTROL ADMINISTRATION (F.W.P.C.A.) (now Environmental Protection Agency), DELAWARE ESTUARY COMPREHENSIVE STUDY: PRELIMINARY REPORT AND FINDINGS (1966); A. KNEESE & B. BOWER, MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS (1968); Roberts, *River Basin Authorities: A National Solution To Water Pollution*, 83 HARV. L. REV. 1527 (1970); Freeman & Haveman, *Water Pollution Control, River Basin Authorities, and Economic Incentives: Some Current Policy Issues*, 19 PUBLIC POLICY 53 (1971).

[19] This point was emphatically made by the Governor in recent remarks to the Maine Legislature:

> One further enforcement measure which will be before the Legislature is the principle of the effluent charge. I do not support enactment of this measure in any way which will impair our timetables or unjustly penalize companies which have already made expenditures to meet the timetables. I hope instead that an effluent charge can be shaped which will act to penalize those who fall behind the timetables. For better or worse, our past legislation has committed us, from now until 1976, to a system based on classifications and timetables. To the extent that it is too weak, we will achieve better results by reinforcing and strengthening it than we would in the confusion of an abrupt shift to a different system.

Special Message on Legislation from Governor Kenneth M. Curtis to the 105th Maine Legislature, Jan. 20, 1971.

PROPOSED LEGISLATION

§ 418 Imposition and Expenditure of Effluent Charges

Commentary on Title

Inasmuch as existing water pollution control laws and the administrative framework of the Environmental Improvement Commission (EIC) are to be left totally intact with the enactment of effluent charges, it is necessary to fit the proposed mechanism appropriately into the existing statutory scheme. Therefore, it is proposed that ME. REV. STAT. ANN. tit. 38, ch. 3 (dealing with the protection and improvement of water), subch. 1, art. 2 (dealing specifically with water pollution control), be amended by adding a new section (§ 418) with appropriate subparagraphs.

1. Statement of Purpose.

The legislature finds and herein declares: that individual acts of water pollution as defined in paragraph two[20] or the combined effect of several separate water polluting activities have frequently resulted in the lowering of the quality of many portions of the State's waters below the water quality standards imposed; that the reduction of water quality below the standards imposed is inimical to the State's interest and should to the fullest extent and as rapidly as possible be abated;[21] that existing water pollution control laws and timetables may not contain sufficient deterrents to water pollution and do not provide adequate economic incentives[22] to reduce pollution loads to levels which will insure the con-

[20] The term "pollution" is not defined in the Maine statutes. Other states have defined it as follows: " 'Pollution' means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects: (1) such waters for beneficial uses, or (2) facilities which serve such beneficial uses. 'Pollution' may include 'contamination.' " CAL. WATER CODE § 13050(1) (West 1971); " '[P]ollution' means the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental or injurious to humans, animal life, vegetation, or property or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose. . . ." TEX. REV. CIV. STAT. ANN. art. 7621d-1, § 1.03(12) (Supp. 1970); " 'Pollution' includes contaminating or rendering unclean or impure the waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life." WIS. STAT. § 144.01(11) (Supp. 1971).

[21] *See, e.g.*, ME. REV. STAT. ANN. tit. 38, §§ 361, 541 (Supp. 1970).

[22] Currently the only economic incentives to control pollution are exemptions from sales and property taxes, *e.g.*, ME. REV. STAT. ANN. tit. 36, §§ 656(1)(E) (1964), 1760(29) (Supp. 1970). A majority of the states now provide such incentives, but many of the laws are seriously deficient as pollution control mechanisms. McNulty, *State Tax Incentives to Fight Pollution*, 56 A.B.A.J. 747, 750 (1970). One recent article has asserted that tax incentives are not only inadequate but improper solutions to the problem. Reitze & Reitze, *Tax Incentives Don't Stop Pollution*, 57 A.B.A.J. 127 (1971); *accord*, Roberts, *River Basin Authorities: A National Solution To Water Pollution*, 83 HARV. L. REV. 1527, 1530-37 (1970).

sistent attainment of imposed water quality standards throughout the State; that the principle that individuals creating a harmful situation ought to bear a large portion, if not all, of the costs of ameliorating such harm is sound and ought to be incorporated into the framework of the State's water pollution control laws as completely and as equitably as possible; and that the State needs to find a substantial, new, equitably-based revenue source to meet the growing costs of (1) water pollution control administration, (2) research into the causes and control of water pollution, and (3) the planning, construction, and operation of sewers, laterals, and waste water treatment facilities.[23] In order to deal directly and more forcefully with all of the foregoing issues raised, these provisions providing for the imposition and expenditure of an effluent charge are enacted. It is intended that these provisions be liberally construed and not be bound by restrictive and technical rules of statutory construction so that the broad intent of the State's water pollution control laws, embodied in this chapter, will be effectuated.[24]

Commentary on Paragraph 1

This paragraph evidences a legislative awareness of, and a dissatisfaction with, the results of present water pollution control statutes, outlines objectives which the State intends to achieve with respect to water pollution control, and unequivocably evidences an intent to supplement rather than repeal the existing pollution control laws and to increase the revenue resources available for pollution control purposes by the enactment and subsequent disposition of effluent charges.

The legislature expresses its desire that narrow administrative or judicial interpretations of the powers granted be avoided and not be the cause of frustrating the clear intent of the legislature to deal with the State's water pollution problems.

Lastly, this paragraph may prove to be the most useful, indeed, perhaps the only, written expression of intent and legislative history guiding the regulated, the regulators, and the courts. Subsequent litigation as to the meaning and

[23] The Environmental Improvement Commission's original proposed budget for the 1971-1973 biennium was approximately four million dollars. A revised proposed budget prepared at the Governor's request, when it was evident that in light of the income tax repeal effort such a sum would not be available, was on the order of three million dollars. The Governor's request on behalf of the Commission was for approximately two million dollars. The final appropriation by the 105th Legislature was about one and a half million. Although the State is faced with fiscal constraints and though this figure represents an increase over previous allocations, it is completely inadequate to deal with the responsibilities and problems currently facing the commission and the State.

[24] Narrow judicial interpretations may thwart the intent of the statute if it is not made clear that legislatively determined environmental policies are to override conflicting theories of common law. As recently as 1967 in a crucial water pollution case the Maine Supreme Judicial Court invoked the rule that ambiguities in a statute in conflict with common law must be resolved in favor of the common law. Stanton v. Trustees of St. Joseph's College, 233 A.2d 718, 722 (Me. 1967).

scope of statutes often turns on legislative intent which becomes increasingly difficult to ascertain the more removed in time the litigation is from the date of enactment of the statute.[25]

2. *Definitions.*

A. Commission: is the Environmental Improvement Commission (EIC).

B. Discharge:[26] is the act whereby either effluent or pollutant material is separated from its generating source and disposed of either into the ground or into waters of the State; discharge is also any substance which is itself disposed of.

C. Discharger: is any municipality, sewer district, person, firm, corporation, state agency, or other legal entity which disposes of either effluent or pollutant material into the ground or into the waters of the State.

D. Effluent: is the combination of pollutant material and naturally occurring substances, usually water (sometimes called process water) which usually, though not always, become mixed and subsequently are disposed of either into the ground or into waters of the State.

E. Effluent Charge: is a sum of money (which may be expressed either as a total dollar amount or on a per unit basis) to be paid by a water polluter or polluters to the State of Maine for the privilege of utilizing the waters of the State for the disposal of effluent or pollutant material, which material, either alone or in conjunction with other polluters' discharges, lowers the quality of the receiving state waters below the water quality classification imposed.

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[25] In Maine there are very few documented sources revealing legislative intent. As a rule public committee hearings and executive sessions are not transcribed and no reports emanate from committee activities except when a special study is commissioned by the legislature. The legislative record, which transcribes proceedings on the floor and records the disposition of bills, provides the only commonly available source for construing legislative purpose. Unlike the Congressional Record, however, no material elaborating upon or explaining legislation or proceedings before the legislature or its committees may be added.

[26] In Texas the term " 'to discharge' includes to deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of; or to allow, permit or suffer any such act or omission. . . ." TEX. REV. CIV. STAT. ANN. art. 7621d-1, § 1.03(18) (Supp. 1970). In Vermont, " '[d]ischarge' means the placing, depositing or emission of any wastes, directly or indirectly, into the waters of the state. . . ." VT. STAT. ANN. tit. 10, § 901(3) (Supp. 1971).

F. Pollutant Material:[27] is any non-naturally occurring solid or liquid material, including heated water, which when deposited into any waters of the State gives rise to water pollution.

G. State Waters:[28] includes all navigable (as this term is now or may subsequently be defined)[29] lakes, rivers, ponds and

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[27] Other states employ the somewhat narrower term "waste" rather than "pollutant material." In Vermont, "'[w]aste' means effluent, sewage or any substance or material, liquid, gaseous, solid or radioactive, including heated liquids, whether or not harmful or deleterious to waters. . . ." VT. STAT. ANN. tit. 10, § 901(6) (Supp. 1971). In California, "'[w]aste' includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature, including such waste placed within containers of whatever nature prior to, and for purposes of, disposal." CAL. WATER CODE § 13050(d) (West 1971). The reason for defining the term "pollutant material" as non-naturally occurring substances is to avoid the issue of whether spilled oil and other substances not usually classified as "wastes" are to be included within the statute. They are to be included. *See, e.g.*, United States v. Standard Oil Co., 384 U.S. 224 (1966), in which the Supreme Court held, "Oil is oil and whether usable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant." *Id.* at 226.

[28] California defines "waters of the state" as "any water, surface or underground, including saline waters, within the boundaries of the state." CAL. WATER CODE § 13050(e) (West 1971). Ohio law defines the term as follows: "'Waters of the state' means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, which are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters which do not combine or effect a junction with natural surface or underground waters." OHIO REV. CODE ANN. § 6111.01(H) (Supp. 1970).

[29] The word "navigable" has been expanded over time by the Maine Supreme Judicial Court and has become a far more inclusive term than it had been at English common law. For the history of this evolution see 2 H. HENRY & D. HALPERIN, MAINE LAW AFFECTING MARINE RESOURCES 221-30 (1970); Waite, *Public Rights in Maine Waters*, 17 MAINE L. REV. 161 (1965). At common law the term "navigable" was applied only to those waters affected by tide. In Wadsworth v. Smith, 11 Me. 278 (1834), the Maine court adhered to this narrow definition but recognized that the public also had rights in waters not navigable in that strict sense. The court held that those waterways "which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right. . . ." *Id.* at 280-81. The court's emphasis was on commercial feasibility; and the test adopted was a factual one, a determination of whether the stream is large enough to float a log to the mill. Later, the case of Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907), eliminated the distinction between "navigability" and "floatability" and held that the former term should henceforth be applied to situations covered by the latter. *Id.* at 47, 68 A. at 531. Furthermore, the court extended the public interest to include recreational as well as commercial uses. It found that "[c]apa-

streams and tributaries thereto and all offshore coastal waters measured from the point of extreme high tide seaward, which now or which may subsequently be within the jurisdiction of the State of Maine[30] and all waters feeding into these coastal waters.

H. Waste Water Treatment Facility:[31] is any piece of equipment or combinations of equipment, including separate and entire plants, which reduce the quantity of pollutant material or effluent that otherwise would be discharged into the ground or into waters of the State, or which reduce the degree of water pollution by augmenting the flow of water or by aerating the water.

I. Water Polluter: is any discharger who disposes of his effluent or pollutant material by discharging it into waters of the State.

J. Water Pollution: is any discharge into any waters of the State of any non-naturally occurring solid or liquid material, including heated water, arising from the activity of any municipality, sewer district, person, firm, corporation, state agency, or other legal entity.

Commentary on Paragraph 2

Technical terminology is often no more precise than commonly used words and phrases. Defining those terms which are central to a particular legis-

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bility of use for transportation is the criterion . . ." for navigability and that transportation of sportsmen is a "valuable and legitimate" use differing only in degree from commercial necessities. *Id.* at 46, 48, 68 A. at 531-32.

[30] It is currently a matter of dispute whether Maine's jurisdiction extends merely to the three-mile limit or to some further boundary such as the twelve-mile limit or the edge of the continental shelf. See 2 H. HENRY & D. HALPERIN, MAINE LAW AFFECTING MARINE RESOURCES 161-64 (1970).

[31] Other states have defined "treatment facility" in a context which includes solid as well as liquid waste disposal. New York uses the term "treatment works" to mean "any plant, disposal field, lagoon, pumping station, constructed drainage ditch or surface water intercepting ditch, incinerator, area devoted to sanitary land fills, or other works not specifically mentioned herein, installed for the purpose of treating, neutralizing, stabilizing, or disposing of sewage, industrial waste or other wastes." N.Y. PUB. HEALTH LAW § 1202(j) (McKinney 1971). Ohio defines "treatment works" in the same fashion but in addition has singled out the term "industrial water pollution control facility" for special definition. It means "any disposal system or any treatment works, pretreatment works, appliance, equipment, machinery, or installation constructed, used or placed in operation primarily for the purpose of reducing, controlling, or eliminating water pollution caused by industrial waste, or for reducing, controlling, or eliminating the discharge into a disposal system of industrial waste or what would be industrial waste if discharged into the waters of the state." OHIO REV. CODE ANN. §§ 6111.01(F), (J) (Supp. 1970).

lative program and thereby giving them more exact scope and meaning in a particular context will minimize uncertainty and be a guide to the implementing agency, those affected by the legislation, and the courts.

The term effluent charge as defined here and as it would subsequently be imposed by this legislation is intentionally not applied to those initial amounts of water pollution discharge which, either alone or in conjunction with other discharges, do not violate the legislatively affixed water quality classification. Allowance of some discharge without cost acknowledges the principle that riparian rights carry with them the right to discharge a reasonable quantity of effluent or pollutant material into a watercourse.[32] This allowance is not meant to be interpreted as a right to indiscriminately pollute. All receiving waterbodies do, however, have an assimilative capacity which enables them to accept, dilute, and neutralize small quantities of effluent or pollutant material without in any way harming the waterbody.[33] Riparianism would allow discharges which would not exceed this capacity.

This legislation accepts the additional argument that quantities of effluent or pollutant material which may exceed the assimilative capacity of a particular waterbody but which do not cause the imposed water quality classification to be violated have been legislatively defined as reasonable[34] and that therefore no penalty should attach to these discharges. Only those discharges which alone, or in conjunction with others, cause the water quality classification to be violated are unreasonable and, as such, should be subject to an effluent charge.

3. *Establishment of an Effluent Charge.*

An effluent charge is hereby imposed on every water polluter whose discharge of effluent or pollutant material into a portion of state waters, either alone or in conjunction with other water polluting discharges into those same or adjacent portions of state waters, causes the legislatively imposed water quality classification of that portion of state waters into which the discharge or discharges are made or of any other portion of state waters to be violated.[35]

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[32] *See generally* 4 RESTATEMENT OF TORTS 339-93 (1939).

[33] *See generally* 2 G. FAIR, J. GEYER, & D. OKUN, WATER AND WASTE WATER ENGINEERING ch. 33 (1968).

[34] The Maine Legislature has required the Environmental Improvement Commission to "make recommendations to each subsequent Legislature with respect to the classification of the waters and coastal flats and sections thereof within the state, based upon reasonable standards of quality and use." ME. REV. STAT. ANN. tit. 38, § 361 (Supp. 1970). It is clear from the above that the classifications are to reflect reasonableness of water use and are to be determined initially by the commission subject to subsequent legislative enactment. *Cf.* Stanton v. Trustees of St. Joseph's College, 233 A.2d 718, 722 (Me. 1967) (classifications reflecting the "public interest" determine reasonable use).

[35] In determining the constitutionality of an effluent charge, one must begin with the following precept, "[i]n this State the full power of taxation is vested in the legislature and is measured not by grant but by limitation." Opinion of the Justices, 123 Me. 573, 577, 121 A. 902, 904 (1923); *accord*, McCarty v. Greenlawn Cemetery Ass'n, 158 Me. 388, 393, 185 A.2d 127, 130 (1962). Thus the legislature has power to levy an effluent charge unless the state or federal constitutions

In each portion of state waters where the water quality classification is being violated, the total effluent charge shall be measured by the total costs of treating the effluent or pollutant material which causes the water quality classification in that portion of state waters to be violated.[36] This total effluent charge shall be prorated among all of the water polluters who discharge into that portion of state waters in the same proportion as

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prohibit it. One significant limitation on legislative taxing power is contained in ME. CONST. art. IX, § 8, which requires that "[a]ll taxes upon real and personal estate . . . shall be apportioned and assessed equally. . . ." An effluent charge should not be affected by this limitation because the tax is not one on property but is an excise or privilege tax deemed necessary by the legislature to fulfill a legitimate public purpose in bringing water quality within statutory parameters of reasonableness. "[I]t is generally held that a constitutional provision requiring taxation to be equal and uniform applies only to taxes on polls and property and has no reference whatever to excises. 26 R.C.L., page 255, § 226." State v. Stinson Canning Co., 161 Me. 320, 325-26, 211 A.2d 553, 556 (1965). The Maine court has adopted a definition of excise as a tax "'. . . imposed upon the performance of an act, the engaging in an occupation or the enjoyment of a privilege.' 26 R.C.L., Page 236." Opinion of the Justices, 123 Me. 573, 577, 121 A. 902, 904 (1923) (tax on gasoline sales by the gallon is not a tax on property but an excise tax on business transactions); *cf.* Opinion of the Justices, 133 Me. 525, 528, 178 A. 621, 623 (1935) (income tax is imposed on the privilege of receiving income); State v. Hamlin, 86 Me. 495, 504, 30 A. 76, 79 (1894) (inheritance tax is an excise on the privilege of taking by will or descent); State v. Maine Central R.R. Co., 74 Me. 376 (1883) (railroad franchise tax is imposed on powers and privileges even though based on property valuations); State v. Western Union Tel. Co., 73 Me. 518, 531 (1882) ("Our Constitution imposes no restrictions upon the legislature in imposing taxes on business.").

Another source of constitutional limitation is the equal protection clause of the fourteenth amendment. The effluent charge conforms to equal protection criteria, first, because it divides dischargers into classifications which are reasonable and which suit a legitimate public purpose, and second, because it deals uniformly with all those who fall within the same classification. "Whenever the law operates alike upon all persons and property, similarly situated, equal protection cannot be said to be denied." Leavitt v. Canadian Pac. Ry. Co., 90 Me. 153, 159, 37 A. 886, 888 (1897). "Classification is not discrimination. It is enough that those in the same class are treated with equality." Caskey Baking Co. v. Virginia, 313 U.S. 117, 121 (1941). Contributions from dischargers will vary depending on the assimilative capacity of the water body, the state-imposed classification of the water, and the quantity and quality of effluent or pollutant material released. Each of these bases for classification serves a legitimate public purpose and is neither arbitrary nor discriminatory. If water polluters were charged at a flat rate without regard for the above differences, it would result in discrimination of the worst sort because the charge would not be in proportion to the harm done.

A third possible source of constitutional limitation involves the provision prohibiting legislative relinquishment of taxing power. ME. CONST. art. IX, § 9. For a discussion of this issue see note 40 *infra*.

[36] To implement the effluent charge proposal outlined, two technological capabilities are necessary: first, the ability to measure effluent and pollutant material discharges and monitor water quality and, second, the ability to determine the

each individual water polluter's discharge into those waters, based on quantity and quality, bears to the total discharge load received by those waters.[37] The total discharge load shall also be evaluated in quality and quantity terms.

In each portion of state waters where the water quality classification is being violated, thereby subjecting a discharger or dischargers of effluent or pollutant material into those waters to an effluent charge, the total charge shall reflect not only the capital construction costs of building the waste water treatment facilities necessary to achieve the water quality classification imposed on that portion of state waters, including the costs of planning the facilities and of constructing necessary sewer lines and laterals, but also shall include an amount for annual operating and maintenance expenses of the facilities and an amount to be reserved for meet-

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total costs of reducing a total pollutant load to a given level. The commission at present monitors water quality on a selective basis. To expand this effort into a continuous monitoring system would require the setting up of permanent stations on major rivers and the purchase of some mobile monitoring vans to sample less significant water bodies. There is no technological impediment to starting such a program. Interview with George Gormley, Chief of the Bureau of Water Pollution Control, EIC, in Augusta, Maine, June 28, 1971. Cost estimates for bringing water pollution levels down to existing water quality classification standards have already been submitted to the commission by nearly all municipalities in the State. Many industrial polluters have also submitted estimates. The data is in most cases recent, and all of it is available in EIC files. Gormley interview, *supra*. In addition, the E. C. Jordan Co. has summarized water pollution control costs in a special report prepared for the State Planning Office. The report has divided the state into watershed regions, has charted which waters are below state classifications, and has made recommendations about the kinds of facilities necessary to achieve the legislatively imposed water standards. R. HUNTER & S. GOODNOW, MAINE WATER RESOURCES PLAN, WATER SUPPLY AND SEWERAGE FACILITIES ANALYSIS (1969). Both the EIC and the Jordan report place the total cost for achieving the State's existing water quality classification standards at $300-350 million.

[37] This method of determining assessments is similar to the user-charge concept commonly employed by municipalities to defray water delivery and sewage disposal costs. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 4253 (Supp. 1970) which authorizes municipalities to levy fees for water and sewer services based either on quantity of flow or on other factors of use such as the number of fixtures, connections or residents within each structure. Assessment is proportionate to services rendered. However, the effluent charge concept would encompass an entire stream or water basin rather than a single municipality; and it would be based on quality as well as quantity. To some extent quality is also recognized in the present Maine statute as a factor affecting sewage disposal fees. "In cases where the character of the sewage from any manufacturing or industrial plant, building or premises is such that it imposes an unreasonable burden upon the sewer system, an additional charge may be made therefore," or the discharger may be compelled to treat his effluent before it goes into the system. ME. REV. STAT. ANN. tit. 30, § 4253(2) (Supp. 1970). Further parallels to effluent charge may be found in the concept of special assessment discussed in note 43 *infra*.

ing the eventual replacement costs of the facilities.[38] In addition, after completion of the above computations, the amount due from each individual water polluter subjected to an effluent charge shall be increased by one percent to enable the commission to carry on water pollution control research and to offset part of the costs incidental to monitoring and administering the system of effluent charges.[39]

The commission shall maintain and continuously update a complete list of those state waters and portions thereof in which the water quality classification is being violated, thus subjecting a discharger or dischargers of effluent or pollutant material into those waters to an effluent charge. Where the classification is being violated, the commission on an annual basis, utilizing reasonable cost estimating and accounting techniques, shall compute the total effluent charge which is imposed on a discharger or dischargers who cause the violation by determining all of the capital construction, operating, maintenance and replacement cost dollar amounts required to construct, operate, maintain and eventually replace the waste water treatment facilities necessary to achieve the legislatively determined classifications.[40] The commission shall prepare and revise,

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[38] Present municipal revenue bonding statutes require that service rates properly reflect not only the operating expenses but also all contributions to bond sinking funds and reserves for maintenance and repair. ME. REV. STAT. ANN. tit. 30, §§ 4253, 4255 (Supp. 1970).

[39] Other statutes have allowed regulatory agencies to recover part of their operating costs in such a fashion. *See, e.g.*, ME. REV. STAT. ANN. tit. 8, §§ 393, 653 (1964) (Division of State Fire Prevention); ME. REV. STAT. ANN. tit. 9, § 2 (Supp. 1970) (Department of Banks and Banking); ME. REV. STAT. ANN. tit. 10, § 2105 (Supp. 1970) (Maine Mining Bureau).

[40] It may be argued that to vest such authority in the commission is to surrender legislative taxing power in violation of ME. CONST. art. IX, § 9, but such is not the case. The commission's powers are purely ministerial. All discretionary variables in the tax assessment process, such as waterbody classifications, criteria for computing costs, and the method for cost apportionment are fixed in advance by the legislature. The commission's role is merely to execute the policies of the statute in conformance to firmly delineated standards. In Michigan Central R.R. Co. v. Powers, 201 U.S. 245 (1906), the United States Supreme Court considered such an issue in applying due process requirements to a state tax law. It held,

> [W]here a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate.
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> [I]t seems more reasonable that the . . . rate should be fixed by this mathematical computation . . . than for the legislature to prescribe in advance that which it may hope will be such rate. In the one case the exact average is determined; in the other an estimate is made, which may turn out to be more or less than the average.

when necessary, the quantity and quality of discharge prorating formulas[41] to be used when the discharges of more than one water polluter give rise to a violation of the water quality classification in a particular portion of state waters.

The commission shall forward to the state tax assessor by June 30th of each year the total effluent charge, determined for each portion of state waters where the classification is being violated, thus subjecting a discharger or dischargers of effluent or pollutant material into those waters to an effluent charge. This charge shall be broken down into: capital construction, operating, maintenance and replacement reserve costs; a list of the water polluter or polluters who contribute to the classification violation in each portion of state waters where such violation in fact occurs; and, where more than one discharger contributes to a classification violation, the appropriate prorating formula which is to be used to distribute the total effluent charge arising from each situation of classification violation among the total number of contributors.[42] Total capital construction costs shall not be included each year in the materials submitted by the commission to the state tax assessor but shall only be included in the first year in which construction is deemed necessary. Revisions of capital construction costs upward or downward shall be forwarded by the commission to the state tax assessor in the year in which the revision is made.

By September 30th of each year, the state tax assessor, from the materials submitted to him by the commission, shall prepare and mail individual bills to all water polluters subject to an effluent charge. The state tax assessor is also authorized, if requested and if the amount exceeds $500, to prorate that portion of any water polluter's effluent charge

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Id. at 297-98.

The Court reached a similar conclusion in a case which tested the authority of Congress to delegate the power of fixing customs duties. It was held, "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Hampton & Co. v. United States, 276 U.S. 394, 409 (1928).

[41] Because the effluent charge is intended to function as an incentive for private action, it is important to reward promptly any discharger who improves his in-plant processes thereby reducing his discharge of effluent or pollutant materials into state waters. This reward is effected by revising the prorating formula as the quantity and, most importantly, the quality of pollutant material changes over time.

[42] The state tax assessor should compute and collect the tax from each discharger based on data provided by the commission. The assessor performs a similar role in the collection of other state taxes such as the sales and use tax, telephone excise tax, and gasoline tax. ME. REV. STAT. ANN. tit. 36, §§ 1951 (Supp. 1970), 1952, 2686-87 (1964), 2906 (Supp. 1970).

bill attributable to capital construction over a five-year period.[43] Five percent interest per year shall be paid by water polluters electing this option on the unpaid prorated capital construction portion of the effluent charge. Individual water polluters subject to an effluent charge shall have until December 31st of each year in which an effluent charge bill is received to remit payment to the state tax assessor of the full amount of the charge.

Commentary on Paragraph 3

Initially, this paragraph places the total cost burden for water pollution cleanup in those portions of state waters where the water quality classification is being violated on those who contribute to the condition giving rise to the violation. However, the definition of "total cost of treating . . ." may be interpreted to mean "total [state] cost of treating. . . ." This construction would reduce the total effluent charge which could be levied on the classification violators by the total amount of the federal contribution to waste water treatment plant construction programs.[44] Individual effluent charge bills would therefore be reduced in proportion to the federal share of the total costs involved in eliminating the classification violation.

Additionally, by a slight alteration of the existing language, the State can and may wish to recognize that, because of the general benefits to which clean waters would give rise, some portion of cleanup costs should be borne by the public at large out of general tax revenues. The State could express the degree to which it was willing to forego shifting back its share of water pollution cleanup costs onto the polluters as a percentage of the federal share of these costs, as a percentage of the total cleanup costs, or as an absolute dollar amount.[45] Whichever way were chosen, the effect would be a further reduction of the total effluent charge in each portion of state waters where violations of

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[43] The spreading of capital construction costs over a period of years in analogous to a similar privilege accorded owners charged with special assessments. *See, e.g.*, MASS. GEN. LAWS ch. 80, § 13 (1969); WIS. STAT. ANN. § 66.54(7) (Supp. 1971). The five-year term herein established parallels a provision in the Internal Revenue Code allowing a five-year amortization period for depreciating construction costs of certified pollution control facilities. INT. REV. CODE of 1954, § 169(a).

[44] Though the federal contribution to the costs of constructing waste water treatment plants is set at either 50 or 55 percent under 33 U.S.C. § 466e (Supp. V, 1970), the reduction of total pollution cleanup costs by virtue of the federal contribution may well be less because the federal government in its principal grant program provides no funds for sewer and lateral construction but only for "treatment works" as that term is defined in 33 U.S.C. § 466j(C) (1964). Grants are available for such construction from other federal programs; but no substantial aid is provided for land acquisition, operating expenses and replacement costs. See note 45 *infra*.

[45] At present, up to 85 percent of the cost of constructing municipal waste water treatment works may be funded through grants-in-aid from federal and state sources. 33 U.S.C. § 466e (Supp. V, 1970); ME. REV. STAT. ANN. tit. 38, § 411 (Supp. 1970). However, the State provides no money for the construction of collection systems, the sewers and laterals feeding into the treatment works. Communities which qualify may receive federal grants for such construction, often amounting to 50 percent federal participation. *See, e.g.*, 42 U.S.C. §§ 1492, 3102,

water quality classifications required such charges to be levied and a further reduction of individual effluent charge bills by an amount proportionate to the State's general contribution.

The provision requiring that the formula used to prorate a total effluent charge among those who contribute to the total pollution load take into account both the quality and quantity of effluent and pollutant material is essential if the overall effluent charge system is to have any equity. Unlike charges for the delivery of electricity, fuel oil, or fresh water which, because of the more or less homogeneous character of the goods delivered, will deal equitably with those served if the bill merely reflects quantity differentials, waste water treatment involves not only quantity differentials but a wide range of heterogeneous effluent and pollutant materials. The cost of treating these differing materials varies widely. Circumstances will undoubtedly arise where rather large volumes of effluent or pollutant materials of a type capable of being subjected to low cost treatment technologies will become mixed in a sewer system or in a receiving waterbody with much smaller quantities of effluent or pollutant materials which can only be dealt with by more sophisticated and higher cost treatment methods. In these situations, total treatment costs are not simply a function of the quantity of materials handled. The quantity certainly is a factor which the formula must reflect, but the type and quality of the effluent or pollutant material are also factors which the prorating formula designed by the commission must reflect.

Furthermore, the commission should not be limited to a single effluent or pollutant material quality criteria. Biochemical oxygen demand (BOD) is a

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3131 (Supp. V, 1970). But neither state nor federal programs provide any substantial aid to cover land purchases, operating and management expenses and allowances for repair and eventual replacement. Therefore, the municipal share of funding the total pollution abatement effort will always exceed 15 percent, often by a large margin when extensive ancillary systems must be built.

For a municipality to receive maximum federal funding for treatment works construction, the state is required to contribute at least 25 percent of the cost. 33 U.S.C. § 466e(b) (Supp. V, 1970). Maine law currently exceeds this requirement by authorizing 30 percent or, in some cases, 35 percent if the project covers more than one municipality and is ineligible for the five percent federal aid bonus. ME. REV. STAT. ANN. tit. 38, § 411(1) (Supp. 1970). With the adoption of the effluent charge concept, this Maine statute should be re-examined in the light of the following considerations:

(1) Should an effluent charge levied against a municipal polluter include that portion of capital construction costs currently provided by grants-in-aid from general state revenues? Assuming that it should, will the federal government be satisfied that the state is providing 25 percent of treatment works construction costs if the state recovers its contribution through an effluent charge levied against the polluter either by direct assessment or by the municipal "pass-through" provision provided in paragraph five?

(2) If the federal government does permit Maine to recover its required contribution from the dischargers, should the state nevertheless continue to subsidize municipal construction costs from general revenues by recovering only a portion of its contribution through the effluent charge?

(3) If the federal government does not permit the state to recover any of its contribution through the effluent charge, should the state reduce its municipal subsidy from the current 30 to 35 percent to the minimum required level of 25 percent?

quality criterion commonly used, but it is only one such criterion, and rather simplistic. Such factors as temperature, toxicity, suspended solids, dissolved oxygen, acidity, concentration of metals, color, odor and turbidity are some of the other indices of water quality[46] which can and should be examined by the commission to see what effect, if any, these water quality factors will have on waste water treatment costs in each respective area where water quality violations subject a discharger or dischargers to an effluent charge.

The provision indicating the component costs which the effluent charge is intended to cover is designed first to identify some of the different categories of cost which are necessitated by a comprehensive ongoing waste water treatment program and then to clarify which of these costs the proposed system of charges would require those who originate the wastes to bear. The short answer with respect to the latter point is all or nearly all costs will be borne by the originator. Initially, planning is necessary in each area where waste water treatment is required[47] and then the building of a collection system and treatment facilities can be instituted. These facilities must be maintained and operated over a long period of years and eventually these capital investments must be replaced. The system itself must first be established on a statewide basis and then continuously monitored and administered. All of these activities give rise to costs which should be part of any complete system of effluent charges.[48]

The remaining provisions in the paragraph deal largely with identifying the variety of ministerial functions which must be performed to enable collection of the charges and allocating them between the commission and the state tax assessor. A less desirable but perhaps necessary alternative approach to the one suggested in this legislation, which might be undertaken for policy reasons or because of a determination that some or all of the functions performed by the commission involve too much discretion and therefore are not merely ministerial but in fact constitute an improper delegation of taxing power, would be to have the commission's function be that of continuously recommending to the legislature in each of the subject matter areas outlined. The legislature would then have the responsibility in an annual effluent charge bill of enacting the constituent variables which would enable the charge to be computed. This system is not unlike the existing water classification system where the commission recommends and the legislature classifies.[49]

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[46] Many of these criteria are already alluded to in the statutes defining water quality classifications. ME. REV. STAT. ANN. tit. 38, §§ 363-64 (Supp. 1970).

[47] Depending on the size of the municipality, a portion of preliminary planning costs may be assumed by the state under ME. REV. STAT. ANN. tit. 38, § 412 (Supp. 1970). If these plans are executed, communities may then receive reimbursements from federal funds when the planning effort is subsequently assumed as part of the construction costs. 33 U.S.C. § 466e(e) (1964). Further reimbursement may also be provided by the state but only if the preliminary grant did not exceed 30 percent of the planning project cost. ME. REV. STAT. ANN. tit. 38, § 411(3) (Supp. 1970).

[48] Parallel provisions in the Vermont approach to effluent charge are contained in VT. STAT. ANN. tit. 10, § 912a (e) (Supp. 1970).

[49] The duty to make such recommendations is assigned to the commission in ME. REV. STAT. ANN. tit. 38, § 361 (Supp. 1970). The legislative classifications are found in ME. REV. STAT. ANN. tit. 38, §§ 367-71 (Supp. 1970).

An annual time sequence is established for the benefit of both those subject to the charge and the administering agencies.[50]

Finally, allowing the capital construction cost component of an effluent charge to be spread over a five-year period is a fair and realistic way of reducing the immediate economic impact of water pollution cleanup. This cost will undoubtedly be the largest element of the effluent charge and lump sum payment is both unnecessary and unwise. The time period chosen could be made as long as desired or, alternatively, it could be made identical with whatever period is statutorily established or commonly used for the repayment of construction bond indebtedness in the State.[51]

4. Coverage and Effective Date.

All entities, public or private, defined as "discharger[s]" in paragraph two shall be subject to an effluent charge if the water quality classification of that portion of state waters into which they dispose of their effluent or pollutant material is violated or if the classification of any other portion of state waters affected by their discharge is violated, thereby necessitating a program of waste water treatment. The charges shall commence six months from the date of enactment of this legislation and, with the exception of the first partial year occasioned by the timing of the date of enactment of this legislation, shall be computed on an annual basis with the charge year commencing April 1st and ending March 31st of each following year.[52]

Commentary on Paragraph 4

The intent of this paragraph is to make it clear that no discharger of effluent or pollutant materials causing a violation of legislatively determined water quality classifications shall be exempt from effluent charges imposed to meet the costs of waste water treatment designed to meet those classifications. The "grandfather" status which some dischargers are accorded by the licensing sections of the water pollution control statutes[53] does not give rise to an exemption from effluent charges imposed by these provisions. It

[50] This paragraph in conjunction with paragraph four of the proposed statute contains provisions which allow the commission, the state tax assessor, and the individual water polluter faced with an effluent charge bill each to have three months to perform his respective function. Of course, these time allocations may be varied in any way deemed appropriate by the legislature.

[51] ME. REV. STAT. ANN. tit. 30, § 4252(2) (Supp. 1970), authorizes municipal bonds to run no longer than 30 years.

[52] The six-month implementation period is merely an estimate of the time required and may be increased or decreased if necessary. Similarly, the decision to assess the effluent charge on an annual basis is also subject to alteration. Either a quarterly or semiannual assessment period might be used instead.

[53] The grandfather clause, similar to nonconforming use right status in zoning law, is contained in ME. REV. STAT. ANN. tit. 38, § 413 (Supp. 1970). Though not subject to modern discharge licensing requirements, grandfathers are subject to the cleanup timetables. However, the 105th Legislature has revised the law to abolish the grandfather status altogether in 1976. Ch. 461, [1971] Me. Laws 659-64.

should also be noted that these provisions in no way exempt dischargers subject to licensing under the statutes from complying with those licensing requirements. In other words, whether one is subject to an effluent charge, his status under the licensing sections of the statutes is a completely separate issue in no way affected by the provisions of this section.

The provision allowing six months after the date of enactment of this section before the effluent charges commence is designed to allow the commission a sufficient time period for preparation to meet the broad new responsibilities imposed. Additionally, dischargers subject to an effluent charge, on notice that it will shortly commence, may immediately make a range of modifications in their patterns of handling effluent or pollutant materials which will reduce the quantity or quality of these materials disposed of into state waters, thereby reducing their aliquot shares of the particular effluent charge to which they are subject.[54] Most ideally, these modifications could reduce the total pollutant load in a receiving waterbody to the point where the classification was no longer being violated, negating the need for, and the legal capacity under these provisions to impose, an effluent charge.

Lastly, the establishing of the ending of the effluent charge year on March 31st of each year, coupled with the provisions in paragraph three, allows the commission three months to prepare, assemble, and submit the statutorily required materials necessary to compute total and individual effluent charges to the state tax assessor who, in turn, has three months to issue the individual charge bills. Individuals subject to the charge are also given three months to remit their payments to the State.

5. Shifting of the Effluent Charge Burden.

Any municipality, sewer district, state agency or other public entity which by virtue of these provisions becomes subject to an effluent charge is hereby authorized by a system of fees or sewer service charges to shift back any or all of the charge onto those individual persons, households, firms, corporations or other private entities within their respective legal boundaries or corporate jurisdictions who originate the effluent or pollutant materials which require treatment and which thus subject the municipality, sewer district, state agency or other public entity to an effluent charge.[55] Any fees or sewer service charge levied by a govern-

[54] An excellent example of the results an effluent charge is capable of producing was related by Senator William Proxmire in testimony before the Senate Subcommittee on Air and Water Pollution. *Hearings on S. 3181 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., pt. 1, at 188-89 (1970). In 1965, the town of Otsego, Michigan decided to charge its major industrial polluter for treating any effluent which created an average biochemical oxygen demand (BOD) greater than 500 pounds per day. Before imposing the charge, the town was receiving an average BOD load of 1500 pounds per day. In the first billing month the average dropped to 900 pounds per day; in the second it was 733 pounds per day; and by the third month the average was reduced to the 500 pounds per day target level, a total reduction of 66 percent, relieving the polluter of having to pay an effluent charge.

[55] At present, municipalities and sanitary districts are empowered to levy fees for sewage disposal services. ME. REV. STAT. ANN. tit. 30, § 4253 (Supp. 1970).

mental unit pursuant to this paragraph must be prorated among those dischargers within its jurisdiction who create the effluent or pollutant material on a basis which takes into account the quantity and quality of those materials which each individual point source contributes to the total discharge load. If requested by any governmental unit acting pursuant to this paragraph, the commission, by virtue of the statewide expertise and experience in developing prorating formulas which it has, is authorized to lend that unit whatever assistance it can in the development of an appropriate prorating formula for the system of fees or sewers service charges which the governmental unit is contemplating.

To the extent that systems of fees or sewer service charges, particularly those sought to be applied to households, may be most easily calculated if the quantities of fresh water supplied to, and the total water bills of, individual households or other water users are known, a governmental unit acting pursuant to this paragraph may have access to the records of any public or private water supplier subject to regulation by the Public Utilities Commission[56] for purposes of determining the total water billings, the quantities of water delivered, and the timing of deliveries to individual customers of the water supplier. Nothing in these provisions shall be construed as preventing, whenever practicable, a fee or sewer service charge system from being expressed, in whole or in part, as a percentage of water supply charges.

Commentary on Paragraph 5

The purpose of this provision is to allow a further shifting of the costs of water pollution control and cleanup onto those who actually create the need for these programs. All of the rationales which initially justify the State looking to dischargers rather than to the general public to bear these cost burdens operate at this level as well. There is no justification for a municipality, sewer district, state agency or other public entity to meet its effluent charge burden

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ME. REV. STAT. ANN. tit. 38, § 1202 (Supp. 1970). However, the exact costs which these fees may cover is somewhat unclear. The above provision of the proposed statute would remove this uncertainty and allow municipalities, sanitary districts and any other public entity which finds itself subject to an effluent charge to recover all of the costs included in the charge as set forth in paragraph three by assessing those constituents or customers who give rise to the pollutant load a proportionate share, based on the quantity and quality of each individual contribution, of the total effluent charge burden.

[56] Currently, ME. REV. STAT. ANN. tit. 35, § 5 (1964) grants to the Public Utilities Commission access to business records of regulated utilities. The above provision of the proposed statute would merely extend to other governmental entities a limited access right to water company records for the purpose of determining water billing charges. It may be necessary to add to the existing statute a cross-reference to the provision proposed above so that water companies are more adequately notified that they may be required to disclose certain records to public agencies other than the Public Utilities Commission. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 4253(2) (Supp. 1970).

out of general revenues to which everyone contributes on some uniform basis oblivious to who actually is causing the problem and benefiting economically. Where direct benefits are conferred, as they most assuredly are when government extends to individuals the privilege of disposing of effluent and pollutant materials in state waters, direct payments in such forms as excises, fees, charges and special assessments[57] are warranted.

The prorating of fees or charges within a governmental unit levying such fees and charges among those who contribute to the total discharge load on the basis of the quantity and quality of the contribution is a self-evident extension of the arguments previously made to justify prorating by the State on these bases of an original effluent charge made necessary by the actions of more than one water polluter. The commission's expertise in this vital area is intended to be fully available to any governmental unit wishing to use it.

Lastly, the petty bickering which has already emerged in some portions of the State between municipalities, some of which are already experimenting with modified forms of sewer service charges, and water suppliers who could voluntarily provide valuable assistance with respect to metered quantities of water supplied to individual customers and the billings to these customers is sought to be avoided by giving those governmental units acting pursuant to this paragraph the corollary power to compel the release of these items of information. The provision invites wherever and to the fullest extent possible systems of sewer service charges which piggy-back on water supply charge systems. Administrative cost savings alone justify this posture. The value that two meters—one at the front of the house measuring water inflow and one at the back measuring water outflow—could serve is diminimus at best.

6. *Set-off Provision until 1976.*

Any water polluter subject to an effluent charge may, in submitting payment to the State, subtract expenditures up to but not in excess of the effluent charge, made by him during the charge year, defined in paragraph four, to comply with the waste water treatment plant construction timetables contained in § 451 and other provisions of this chapter.[58] In

[57] "[S]pecial assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement." Illinois Central R.R. Co. v. Decatur, 147 U.S. 190, 198 (1893). "A special assessment is in the nature of a tax levied upon property according to the benefits conferred on the property." State Highway Comm'n v. City of Topeka, 193 Kan. 335, 337, 393 P.2d 1008, 1010 (1964). For further discussion of the benefit theory of special assessments, see S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 684-709 (1970). It should be noted that when a use of property gives rise to a public detriment, the owner may properly be assessed for the cost of abating the detriment even though the benefit accrues more directly to the general public than it does to the property owner. A case which supports this theory in a factual context which parallels the effluent charge concept is Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405 (1935). The Supreme Court held "that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost." *Id.* at 430.

[58] ME. REV. STAT. ANN. tit. 38, § 451 (Supp. 1970). Individual timetables for

computing expenditures to be subtracted from the levied charges, amounts received by the polluter in the form of federal or state grants towards the completion of the construction project are to be excluded. The polluter shall have the burden of itemizing and verifying all expenditures sought to be set off against an effluent charge liability on forms and in a manner provided by the state tax assessor. Expenditures which are of a dual character, having both pollution control and plant improvement or modernization characteristics, shall first be subject to the commission's determination as to the portion of the total expenditure properly allocable to pollution control and thus eligible to be set off in the manner described above.[59] Expenditures eligible to be set off in any effluent charge year which exceed the effluent charge liability for that year may be carried forward to future effluent charge years and set off against the charge due in the future year,[60] but in no case may an expenditure be carried forward and set off against an effluent charge liability arising after October 1, 1976, which date shall be the termination date of all of the set-off provisions of this paragraph.

Nothing in this or any other paragraph of the section shall be construed as an alteration, exemption, or waiver of any of the water cleanup timetable provisions of this chapter to which a discharger may be subject.

Commentary on Paragraph 6

This paragraph is intended to avoid forcing those water polluters who are responsibly meeting the existing water pollution cleanup timetable from, in

particular localities are contained in ME. REV. STAT. ANN. tit. 38, §§ 368 (Kennebec River, Main Stem, and Certain Waters of the Penobscot River Basin), 370 (Hancock County and Stockton Springs) (Supp. 1970).

[59] A Maine paper company recently made a dual purpose investment of $10 million which not only reduced their pollutant output by 80 percent but also cut costs through the recovery and reuse of magnesium, sulfur-dioxide, and heat energy. In addition to building a by-products recovery plant, the company redesigned its entire operation in order to use chemicals more adaptable to recovery processes. Most of the plant modernization (which involved capital outlays beyond the $10 million) was economically justifiable in its own right. Only the $10 million spent on the recovery plant was motivated in part by pollution abatement objectives; however, even that investment is providing a return, although a somewhat smaller one than the company would normally require from a comparable capital outlay. Interview with Patrick Welsh, Environmental Protection Supervisor of the Northern Division of Great Northern Paper Co., in Millinocket, Maine July 2, 1971.

[60] It would be possible also to include a "carry back" provision which would grant to polluters a rebate of previously paid effluent charges if pollution control expenditures made to comply with 1976 timetable deadlines in a given year exceed the charge for that year. This device was intentionally rejected because it would encourage delay. If a discharger may recover his effluent charge assessments by expenditures made at any time up to October 1, 1976, he sacrifices nothing by waiting until the last minute to comply with classification deadlines. This is the exact opposite motive from that which an effluent charge is intended to create.

effect, paying their share of the costs of cleanup twice, once in the form of expenditures made to keep pace with the timetable and again in the form of an effluent charge. To the extent that water polluters are on schedule and incurring cleanup costs, they avoid possibly all of the effluent charge liability which would otherwise confront them. The termination of the set-off provision on October 1, 1976, serves two purposes. First, it reinforces the State's resolve, statutorily expressed for nearly a decade,[61] to have the problem under control by the 1976 date. Second, it rewards those who are steadily moving ahead in good faith to achieve their own and the State's water quality objectives and penalizes those whose indifference and foot dragging will result in little or no tangible progress on their part toward pollution control objectives of which they are aware but stubbornly resist meeting. Without a limitation on the set-off provisions, there is little incentive for anyone to construct promptly waste water treatment plants.

Although a set-off provision is desirable, it should not be unrealistic. Thus, all federal or state grant monies are exempted from expenditure computations and dual character expenditures will be subject to examination by the commission, resulting in an allocation of the total dollar outlay between the water pollution objectives and any other corporate objectives which motivated the expenditure. Only the former, of course, should be and are eligible for set-off. The carry-over provisions simply recognize the natural uneveness of many large-scale capital improvement programs and avoid penalizing the polluter for this uneven expenditure pattern. Lastly, the express statement that neither the set-off provision nor any other paragraph of this section is intended to allow any water polluter subject to existing water cleanup timetables an exemption or waiver from those statutory requirements may be a surplusage of caution but at least it leaves the question in an unambiguous posture.

7. *Expenditure of Effluent Charge Revenues.*

All effluent charge revenues shall be considered dedicated revenues of the State to be spent in the amounts and for the purposes outlined in their initial determination and collection and in the geographic areas of origin of the charge revenues for the improvement of water quality in those areas.[62] The only exception to this general dedication of effluent charge revenues back to the areas of origin to pay the total costs of waste water treatment is with respect to the one percent surcharge authorized

[61] The 100th Maine Legislature first declared the 1976 deadline in 1961, thus providing an implementation period of 15 years. Ch. 330, [1961] Me. Laws 533. Subsequent legislatures have altered the timetable dates for compliance with preliminary phases of a waste water treatment program but the final deadline of 1976 has been retained throughout. See notes 11 & 58 *supra*.

[62] There are a number of other state revenues which are dedicated to particular purposes. *See, e.g.*, ME. CONST. art. IX, § 18; ME. REV. STAT. ANN. tit. 5, § 1062 (Supp. 1970) (contributions to various trust funds to be disbursed only for state employee retirement benefits and related purposes); ME. CONST. art. IX, § 19; ME. REV. STAT. ANN. tit. 23, § 1653 (1964) (motor vehicle registration fees, license fees and fuel taxes to be used only for highways); ME. REV. STAT. ANN. tit. 12, §§ 1601, 1607 (Supp. 1970) (Maine Forestry District tax to be used exclusively for forest fire prevention within the district).

in paragraph three to be added annually to each individual effluent charge bill. These revenues are to be made available to the commission for water pollution control research and to offset part of the costs incidental to monitoring and administering the system of effluent charges. With respect to that portion of a total effluent charge earmarked as a reserve for the replacement of waste water treatment facilities as that replacement becomes necessary, the State is authorized to accumulate, hold, and invest such funds in the same manner as other trust funds are held and invested by the State.[63]

All expenditures for waste water treatment programs, including expenditures for planning, sewer and lateral construction, treatment plant construction, and the operation and maintenance of treatment plants, shall be under the direction and supervision of the commission as provided in the above provisions and in § 411 of this chapter.[64] The existence of effluent charge revenues to finance water treatment programs in no way affects or repeals either the $25 million or $50 million bond issues,[65] the proceeds of which shall continue to be allocated by the commission pursuant to §§ 411 and 412 of this chapter for the purposes enumerated therein.[66] The commission shall also continue to work with both local and federal officials to secure and distribute throughout the State those federal grant-in-aid dollars for which the State and its political subdivisions are eligible. Any municipality, sewer district, state agency or other public entity undertaking a waste water treatment program, including the planning thereof, sewer and lateral construction, treatment plant construction, maintenance and operation is hereby authorized to supplement available effluent charge revenues and federal and state grant monies by the issuance of revenue bonds. If revenue bonds are issued for the partial financing of a project, the governmental unit, pursuant to paragraph five of this section, must initiate a system of fees or sewer service charges to recover at least so much of the total cost of the project as was financed by the issuance of revenue bonds.

Commentary on Paragraph 7

The intent of this paragraph is to insure the earmarking of effluent charge revenues with respect to both the designated purposes and the geographic areas to be served. If the charge is to be "measured by the total costs of treat-

[63] The state retirement system includes five trust funds administered by a board of trustees who have power to invest and reinvest the assets subject to the same restrictions as those imposed on savings banks except for an additional, limited authority to trade in equities. ME. REV. STAT. ANN. tit. 5, §§ 1061-62 (Supp. 1970).

[64] ME. REV. STAT. ANN. tit. 38, § 411 (Supp. 1970).

[65] Ch. 235, [1965] Me. Priv. & Spec. Laws 95 (101st Leg., 2d Spec. Sess.); ch. 181, [1969] Me. Priv. & Spec. Laws 1950.

[66] ME. REV. STAT. ANN. tit. 38, §§ 411-12 (Supp. 1970).

ing the effluent or pollutant material which causes the water quality classification in [a] portion of state waters to be violated," [67] its ultimate expenditure must be similarly earmarked to these ends. The provisions for handling the one percent research and administrative cost surcharge and replacement cost portions of the total effluent charge are intended to carry out expressly what might be considered only implied utilization purposes outlined in paragraph three.

Furthermore, the paragraph makes clear that, in all probability, effluent charge revenues will be a supplement to existing federal aid monies for waste water treatment plant construction (see commentary on paragraph three). However, with respect to state aid revenues for treatment plant construction derived from the $25 million and $50 million bond issues,[68] the charge revenues are, in reality, a substitute revenue source, unless the present language of this proposed legislation is altered. Because the bond issue authorizations are not repealed by this legislation, in the short run effluent charge revenues will seem like a supplement to the bond issue revenues. In the long run, however, these revenues will be capable of repaying some or all of the state bond issue revenues now being used for the construction of treatment plants. As was suggested in the commentary to paragraph three and in footnote 45, the State must re-examine its policy with respect to who should pay for water pollution clean-up—the polluter via effluent charges or the general public via bond issues repaid from general revenues. If some combination of the two approaches is to be employed, a decision must be made as to where the balance will be struck.

Lastly, this paragraph contains a provision making it unmistakably clear that any governmental unit engaged in a waste water treatment program may utilize revenue bonds to assist in financing the project. This is necessary in light of what some municipal counsel feel to be the ambiguous character of existing revenue bond authorizing legislation coupled with the fact that many municipal units of government are pressing upon their general obligation bond indebtedness limitations.[69] The only caveat to the use of revenue bonds is that some system of sewer service charges be implemented to serve as the repayment source required by the very nature of the bonds.

8. *Organization of Sanitary District and Joint Action by Governmental Units.*

In situations where no suitable governmental instrumentality exists for carrying out a waste water treatment program, the commission, upon determining that such an instrumentality is essential, and upon giving appropriate notice and hearing, may order two or more municipalities, or one or more municipality(s) and a portion of unorganized territory, or a wholly unorganized area lying in one or more counties to create a suitable instrumentality either by inter-local cooperative agreement[70] or by the formation of a sanitary district.[71] The commission, in issuing its order

[67] See paragraph three of this proposed legislation.

[68] Ch. 235, [1965] Me. Priv. & Spec. Laws 95 (101st Leg., 2d Spec. Sess.); ch. 181, [1969] Me. Priv. & Spec. Laws 1950.

[69] ME. CONST. art. IX, § 15.

[70] ME. REV. STAT. ANN. tit. 30, §§ 1951-58 (1964).

[71] ME. REV. STAT. ANN. tit. 38, §§ 1061-1209 (Supp. 1970) (§§ 1062, 1101-02 have been revised by ch. 400, [1971] Me. Laws 482-86).

creating the instrumentality, shall designate its initial boundaries. Any agreement entered into or any sanitary district formed by such an order shall not be subject to local voter approval requirements which might otherwise be applicable pursuant to municipal charter, local ordinance or state statute.[72] All other local or statutory provisions with respect to either of these instrumentalities shall be applicable except those dealing with dissolution of the instrumentality[73] which shall require commission approval before they may be acted upon.

In situations where a suitable instrumentality exists for carrying out a waste water treatment program but that instrumentality has failed in fact to carry out such a program, the commission, upon determining that such a program is essential, and upon giving appropriate notice and hearing, may order the local governmental officials involved to undertake the design, construction, and subsequent maintenance and operation of whatever collection and treatment facilities are necessary to achieve the designated water quality classifications of state waters located within the jurisdictional boundaries of the governmental instrumentality subject to the order. This order also shall not be subject to local voter approval requirements which might otherwise be applicable pursuant to municipal charter, local ordinance or state statute.

General obligation bond indebtedness, to the extent thought necessary and incurred by virtue of an order of the commission pursuant to these provisions, shall not be subject to any constitutional, statutory, or local debt limitations.[74] The incurring of any indebtedness, whether by general obligation bond, revenue bond, or contract made necessary by an order of the commission acting pursuant to these provisions also shall not be subject to any constitutional, statutory, or local voter approval or referendum requirements which might otherwise apply[75] or the ap-

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[72] *See, e.g.*, ME. REV. STAT. ANN. tit. 38, § 1101(5), (6) (Supp. 1970) (revised by ch. 400, [1971] Me. Laws 484-86).

[73] *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 1953(2)(E) (1964).

[74] In a large number of cases the debt limitation issue will be avoided by reliance on revenue bonds which are not included in the constitutional limitation on municipal debt levels. Opinion of the Justices, 161 Me. 182, 203-04, 210 A.2d 683, 696 (1965). To the extent that general obligation bonds are used in lieu of revenue bonds, the provisions of this legislation will be in conflict with ME. CONST. art. IX, § 15, and will require a complementary constitutional amendment embodying the substance of these provisions.

[75] If, as some might argue, the constitution of the State impliedly requires local voter approval for the issuance of municipal bonds, an appropriate constitutional amendment would have to be tendered on this matter as well as the one discussed in note 74 *supra*. There appears to be no express requirement in the constitution for referenda on municipal bond issues even though several statutes have required them. *E.g.*, ME. REV. STAT. ANN. tit. 30, §§ 4252, 5331 (Supp. 1970) (both dealing with revenue bonds which do not pledge the full faith and credit of the municipality). Additionally, the language of ME. REV. STAT. ANN. tit. 30, § 5152

proval requirements of any other state agency which might otherwise have jurisdiction with respect to such indebtedness.[76]

All orders of the commission issued pursuant to this paragraph shall be enforced as provided in § 451 of this chapter.[77]

Commentary on Paragraph 8

The broad intent of this paragraph is two-fold: first, to allow the commission to bring into existence, when and where necessary, an appropriate and legal governmental vehicle for implementing the purposes for which an effluent charge is created,[78] specifically, the cleaning up of those state waters which do not meet imposed water quality classifications; and second, with the same end in view, to allow the commission to order local governmental officials who nominally have the power to deal with waste water collection and clean-up problems but for some reason are not using that power, to undertake immediately their responsibilities. These provisions stop short of authorizing the commission or any other state agency to assume responsibility for the design and construction of local waste water treatment programs and facilities. An effort is made, albeit under commission order, for continued reliance on local instrumentalities to carry out broad public objectives. It must be recognized, however, that if the order issuing mechanisms fail to produce the facilities needed, the next logical step which must be taken is direct state action to design, build, and maintain these facilities.[79]

(1964) seems to imply the necessity for voter approval of municipal general obligation bond issues. However, at least one statute which authorizes issuance of municipal or quasi-municipal bonds does not require voter approval. ME. REV. STAT. ANN. tit. 38, § 1202 (Supp. 1970) (sanitary district trustees may on their own authority issue general obligation bonds with only the approval of the Public Utilities Commission). In any event, the provisions of the proposed statute are fully intended to override any previous statutory language which might require a public referendum on municipal bonds for sewer and treatment plant construction.

[76] *See, e.g.*, ME. REV. STAT. ANN. tit. 38, § 1201 (Supp. 1970) (Public Utilities Commission must approve bond issues of sanitary districts). It is the intent of the proposed legislation that the EIC be the sole reviewing authority for bond issues generated in compliance with its directives.

[77] ME. REV. STAT. ANN. tit. 38, § 451 (Supp. 1970).

[78] Though the commission is clearly given statutory power to determine when and where treatment facilities shall be built, the statute as presently worded leaves to local governmental leaders the determination of which legal mechanism to use, *e.g.*, an interlocal agreement, a sanitary district, or a line agency of the municipal government. It may be necessary in the future to give the commission power to make this determination also.

[79] This proposed legislation does not authorize the state to use the last and strongest sanction available, to build the necessary facilities through direct state action. Minnesota has empowered its state water pollution control agency to do so if local governments fail to comply with directives. "[T]he agency . . . may by resolution assume the powers of the legislative authority of the municipality and confer on the commissioner the powers of the administrative officers of the municipality relating to the construction, installation, maintenance, or operation of a disposal system, or part thereof, or issuing bonds and levying taxes therefore, after holding a hearing on the case. . . ." MINN. STAT. ANN. § 115.48 (Supp. 1971).

These provisions also intend to remove some of the major impediments to local action. Three examples are: general voter approval requirements which, in establishing basic policy for a local governmental body or bodies, often reflect overly parochial views and fail to grasp the larger or long-run issues and benefits involved; debt limitations, which often pose real or imagined obstacles to raising the needed revenues, particularly in the minds of municipal corporation counsel; and bond issue referendum requirements which, even when broad issues are agreed upon, often enable dissidents to prevent particular action plans (or any plan) from being carried out.

The relatively minor constitutional amendments which these latter provisions would require are not drafted or presented here but should be presented to the legislature as a necessary corollary to these proposals (see footnotes 74 and 75).

9. Regulations.

The commission, upon giving appropriate notice and after public hearing, is hereby authorized to promulgate such general regulations as may be useful or necessary to facilitate implementation of the system of effluent charges established by this legislation. Such regulations may include but are not limited to: provisions calling for the submission of effluent or pollutant material discharge data; provisions requiring water polluters to install at their own expense effluent or pollutant material monitoring equipment calibrated to commission specifications; provisions allowing reasonable periodic inspections by commission staff of effluent or pollutant material discharge and treatment apparatus and of such monitoring equipment as exists; provisions calling for the submission of cost data with respect to any and all aspects of a waste water treatment program; and provisions calling for the submission of data with respect to the natural or predischarge conditions existing in those portions of state waters into which a water polluter discharges effluent or pollutant material.

Commentary on Paragraph 9

The intent of this paragraph, rather than limiting the types of regulatory impositions the commission may develop to carry out a system of effluent charges, is merely to establish the principle that a body of subsidiary regulations developed as need and experience dictate is not only contemplated but is authorized by the legislature. Such legislative authorizations are seldom construed today as improper delegations of legislative power if limited to the carrying out of legislatively determined purposes and if some guidelines as to the scope of such regulations are given by the legislature by way of instruction.[80] Both of these requirements are met in this paragraph. A less desirable

[80] Delegations of power have traditionally been tested in state courts by evaluating the statutory standards that control the exercise of the power. If the legislative standards are adequate, then the delegation is upheld, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.12 (1958). Professor Davis suggests that the focus of a court's evaluation of a delegation should be the administrative standards set by

alternative approach which, if not for legal then for political reasons, may be thought necessary is to require subsequent legislative approval of any regulations sought to be imposed pursuant to this paragraph.[81]

10. Appeal Provisions.

Any municipality, sewer district, person, firm, corporation, state agency, or other legal entity aggrieved or affected by any action taken or order issued pursuant to this section may, within 30 days from the effective date of such action or order, appeal therefrom to the superior court. Notice of such appeal shall state all of the grounds upon which the appeal is based.[82] If the action or order appealed from was preceded by, or the result of, a public hearing or hearings before the commission or any other state agency, the superior court proceedings shall not be de novo. The court shall receive into evidence true copies of the transcript of the hearing, exhibits thereto, and the findings of fact and decision of the commission or agency. The court's review shall be limited to questions of law and to whether the commission or other agency acted within the scope of its authority.[83] Unless the action or order of the commission or other state agency involved is clearly erroneous, it shall be sustained by the court.[84] If the action or order appealed from was not preceded by, or

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the agency rather than the statutory standards established by the legislature. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.11 (Supp. 1970). The delegation under consideration here would be upheld under the traditional delegation standards. *See* Schecter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).

[81] There are instances in which the less desirable alternative has been employed in Maine. *See, e.g.*, ME. REV. STAT. ANN. tit. 38, § 367 (Supp. 1970) (revised by ch. 527, [1971] Me. Laws 751-53; ch. 462, § 3, [1971] Me. Laws 665-67).

[82] To avoid manifest injustice, amendments to the points on appeal should be allowed where additional bases for appeal arise which could not, even with the exercise of utmost diligence, have been raised at the time of filing the notice of appeal.

[83] The trend in review of administrative decisions is away from allowing independent judicial judgments as to law and facts. This trend is seen at the federal level in the demise of the Ben Avon doctrine. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.11 (1958). An example of the decreasing emphasis on de novo proceedings in Maine is the recent revision of the appeal procedure concerning decisions of the Environmental Improvement Commission. ME. REV. STAT. ANN. tit. 38, § 415 (Supp. 1970) (revised by ch. 304, [1971] Me. Laws 352-53).

[84] Professor Davis describes the gamut of judicial review of administrative decisions as ranging from zero to one hundred percent. On one end of the spectrum are unreviewable determinations such as State Department decisions concerning foreign policy while at the other extreme are issues upon which the judiciary may freely substitute its judgment on all questions such as de novo proceedings in certain tax cases. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958). Mr. Justice Frankfurter's discussion of the legislative history of review standards applicable to decisions of the N.L.R.B. gives some indication as to why a range of such review standards is desirable. The standard of review can be used to gain uniformity and to allocate the bulk of the decision making either to an agency or

the result of, a public hearing or hearings, the appeal shall be brought subject to the provisions of rule 80B of the *Maine Rules of Civil Procedure*[85] subject, however, to the same provision stated above that unless the action or order of the commission or other state agency involved is clearly erroneous it shall be sustained by the court. Decisions of the superior court may be reviewed by appeal or report as provided by the *Maine Rules of Civil Procedure.*[86]

Commentary on Paragraph 10

The intent of this paragraph is to limit the scope of judicial review and thus give greater weight and significance to the administrative process. Although the "clearly erroneous" rule is offered as the standard for judicial review, this standard could be modified to a "substantial evidence" rule based upon the whole record. The proposed rule has the advantage of suggesting greater judicial deference to administrative decisions; however, it does not leave the court in the position of merely rubber stamping administrative decisions as the application of a "scintilla" rule might.

The important point is the elimination of de novo proceedings in the appellate process except in those situations where there is no hearing below and thus no record and determination of underlying facts essential to the review process. In this case, a slight modification of Rule 80B should be considered, though not tendered in these provisions. The court could be instructed to remand to the commission, or other state agency involved, appeals based on actions or orders not the product of some hearing process for the preparation of a record germane to the points on appeal.[87] This approach could be required of all such appeals or could be left as a matter of court discretion.

Lastly, the requirement that notices of appeal state the grounds upon which the appeal is based is an intentional effort to define and narrow these issues at the earliest possible date, thereby allowing both sides maximum time to prepare the appeal and to deter the frivolous filing of notices of appeal. If no tenable legal bases for appeal can be stated at this point, the administrative processes ought not to be stymied as they often are if an appeal is pending.

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to the judiciary. *See* Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477-91 (1951).

[85] 2 R. FIELD, V. MCKUSICK, & L. WROTH, MAINE CIVIL PRACTICE 302-20 (2d ed. 1970).

[86] ME. R. CIV. P. 72-73; 2 R. FIELD, V. MCKUSICK, & L. WROTH, MAINE CIVIL PRACTICE 135-79 (2d ed. 1970).

[87] In Johnson v. Wetlands Control Board, 250 A.2d 825, 827 (Me. 1969) the court said:

> We conclude that the matter has been reported to us prematurely.
>
> Therefore, the case is ordered remanded to the Superior Court for the taking of evidence or agreement as to facts necessary to the determination of the issues presented by Section 4704.

The situation envisioned by this provision of the proposed statute is analogous to a case where the superior court, considering an appeal from a decision by the commission, determines that the existing record is insufficient to support a judicial decision. Recognizing the commission's role as fact finder and, more im-

11. Delinquency, Penalties, Causes of Action.

All water polluters subject to an effluent charge who fail to pay their bills in whole or in part by the last due date, December 31st of each year, shall, with respect to the unpaid portion, be deemed delinquent and shall from that date until payment be subject to the penalty surcharges outlined in Title 36, § 5274 (1) and (2).[88] As a means of securing payment of effluent charge bills, the state tax assessor is authorized to institute the proceedings outlined in Title 36, §§ 5313-15.[89] Additionally, upon notification by the state tax assessor, which notification shall be given not later than eighteen months after a delinquent status has arisen, the Attorney General is authorized to proceed under the provisions of Title 36, § 5317.[90]

When a municipality, sewer district, state agency or other legal public entity is in a delinquent status with respect to any portion of an effluent charge liability for a period longer than six months, the assessor shall notify the state treasurer who shall withhold the amount due plus delinquency charges from any other state aid or grant monies due and about to be paid to the municipality, sewer district, state agency or other legal public entity, except where it can be shown that such withholding will be the sole factor causing postponement of construction on waste water collection systems or treatment facilities.[91]

In addition to the above civil remedies to recover unpaid effluent charge bills, the Attorney General is authorized to initiate criminal proceedings if warranted under the provisions of Title 36, §§ 5330-34.[92]

The state tax assessor shall submit to the commission the names of all water polluters whose delinquent status has persisted for six months. The commission immediately shall notify all such polluters that all discharge licenses, whether secured pursuant to the provisions of § 413 (the grandfather licenses) or § 414,[93] are automatically revoked if the unpaid effluent charge liability giving rise to the delinquent status is not paid within fifteen days of the mailing of such notification. Delinquent water polluters who fail to pay their effluent charge liability within the fifteen

portantly, its competence to make the factual determinations relevant to its actions, the court would then be required, or permitted, to remand the proceedings to the commission for the preparation of an adequate record on which to base the appeal.

[88] ME. REV. STAT. ANN. tit. 36, § 5274(1), (2) (Supp. 1970).

[89] ME. REV. STAT. ANN. tit. 36, §§ 5313-15 (Supp. 1970).

[90] ME. REV. STAT. ANN. tit. 36, § 5317 (Supp. 1970).

[91] A similar restriction is placed on school administrative units by ME. REV. STAT. ANN. tit. 20, § 855 (Supp. 1970). If the local school unit does not maintain its schools for a prescribed minimum period, it "shall be debarred from drawing its state school moneys until it shall have made suitable provisions for so maintaining them thereafter."

[92] ME. REV. STAT. ANN. tit. 36, §§ 5330-34 (Supp. 1970).

[93] ME. REV. STAT. ANN. tit. 38, §§ 413-14 (Supp. 1970).

day period shall immediately stop all discharges of effluent or pollutant material into state waters at the end of the fifteen-day period. Discharges after this time are unlicensed and illegal and shall subject the water polluter to the provisions of §§ 453-54 of this chapter.[94] The Attorney General, suing on behalf of the State in seeking to enjoin such discharges, shall be entitled to a temporary restraining order upon a showing of the water polluter's six-month delinquent status, his notification by the commission of the automatic revocation of all discharge licenses if the overdue payment is not received within fifteen days as evidenced by a registered letter receipt, the polluter's failure to pay within that time period as evidenced by the records of the state tax assessor, and a discharge of effluent or pollutant material by the delinquent water polluter after the fifteen-day period.[95] Unless the delinquent effluent charge payment and penalties are received by the time the issue is brought to the hearing stage for a permanent injunction, the court shall grant such permanent injunction.[96]

Nothing in these provisions shall be construed as enlarging or diminishing the rights of any municipality, sewer district, person, firm, corporation, state agency or other legal entity to give rise to, or to be free from, water pollution. To the extent presently existing, all public or private causes of action to abate water pollution or the conditions giving rise thereto continue in force.[97]

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[94] ME. REV. STAT. ANN. tit. 38, §§ 453-54 (Supp. 1970). The loss of a license to discharge wastes for failure to pay an effluent charge liability is analogous to the provisions of ME. REV. STAT. ANN. tit. 36, § 2404 (1964) which makes corporate charters liable to forfeiture for neglect or refusal to pay the annual franchise tax.

[95] Although the granting of a temporary restraining order has traditionally required a showing of irreparable harm, in recent years temporary restraining orders have been statutorily authorized upon a showing that certain stated conditions either have or have not been met. Bradford v. S.E.C., 278 F.2d 566, 567 (9th Cir. 1960). This exception is evidenced in Maine by ME. R. CIV. P. 65(e) which excepts temporary restraining orders in municipal labor disputes from the normal provisions of the irreparable harm rule. *See also* ME. REV. STAT. ANN. tit. 26, § 964(3) (Supp. 1970).

[96] Under the revised ME. R. CIV. P. 65, a temporary restraining order is no longer restricted by a rigid ten-day limitation. Instead, the court fixes the time of expiration in the initial order. 2 R. FIELD, V. MCKUSICK & L. WROTH, MAINE CIVIL PRACTICE § 65.3 (2d ed. 1970). The term of the temporary restraining order provides a last additional time period for the recalcitrant water polluter to make the necessary payments before a permanent injunction bars his discharges into state waters.

[97] *See, e.g.*, Stanton v. Trustees of St. Joseph's College, 254 A.2d 597 (Me. 1969); ME. REV. STAT. ANN. tit. 17, §§ 2701-02, 2804 (1964); ME. REV. STAT. ANN. tit. 38, § 415 (Supp. 1970) (revised by ch. 461, [1971] Me. Laws 659-64); ME. REV. STAT. ANN. tit. 38, § 451 (Supp. 1970).

Commentary on Paragraph 11

This paragraph intends to bring an increasingly onerous range of sanctions to bear against water polluters subject to an effluent charge who would avoid payment of that charge. No major effort is made to design whole new provisions. The State has existing tax enforcement statutes which are capable of serving a double duty. The two minor departures from this approach involve the recovery provisions from delinquent governmental units which almost always will have some state benefits coming to them which can be reduced by the amount of the delinquency and the provisions calling for the automatic revocation of the discharge licenses of delinquent water polluters and the subsequent denial to them of the privilege of using state waters for the disposal of effluent or pollutant material. The detail with respect to the Attorney General's capacity to obtain first a temporary restraining order and then a permanent injunction in cases where delinquent water polluters continue their discharge is intended to overcome judicial reluctance to grant these remedies. By legislative definition, this degree of failure to perform responsibly by a water polluter is a sufficient harm to the State, comparable to the common law concept of irreparable harm, to justify granting first the temporary injunction and then a permanent injunction against a course of conduct by a water polluter inimical to the public interest and at variance with the entire pollution control policies and programs of the State.

The last provision of the paragraph is merely an express affirmation of fact that no existing rights are enlarged or causes of action lost by the imposition of a system of effluent charges.