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Honorable Edward C. Kelleher
House of Representatives
Seat 121
State House
Augusta, Maine 04333

Dear Representative Kelleher:

You have posed a series of questions concerning the legal ramifications of the passage of L.D. 2048, "An Act to Protect the Atlantic Salmon Fishery in the Lower Penobscot River from Veazie to the Southernmost Point of Verona Island." Toward that end, the Department of Attorney General has reviewed the bill and pertinent state and federal laws. Our principal conclusions are as follows:

1) L.D. 2048 on its face is not violative of the federal or state constitution.

2) L.D. 2048 could be held to violate certain provisions of the federal and state constitutions depending upon the resolution of certain factual questions which cannot be answered in the context of this opinion. Specifically, the bill could be found to result in a taking without just compensation (Me. Const., art. I, § 21) or to unlawfully impair an existing contract (U.S. Const., art. 3, § 10; Me. Const., art. I, § 11). Our analysis will endeavor to explain the factual considerations which will govern the resolution of these legal issues.

3) Based upon the above, we cannot say that the Legislature is constitutionally precluded from enacting L.D. 2048. We should advise you, however, that the bill does expose the state to litigation and to potential liability. Since we cannot provide a definitive answer, we believe that the legal risks must be weighed by the Legislature along with the other policy considerations relevant to the bill.

4) Finally, the provisions of L.D. 2048 would likely become inoperative upon the issuing of a license by the Federal

Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (16 U.S.C. § 791(a)). A FERC license, which could be issued at the request of a private party, would preempt the state statute and render it unenforceable.

Factual Background and Questions:

The Bangor dam originally was constructed as part of a municipal water system by the City of Bangor at Treat's Falls 1/ on the Penosbcot River pursuant to a State charter granted in P. & S.L. 1875, c. 138.2/ In addition to its original purpose, the dam has apparently been used to generate hydroelectric power.3/ In 1957, the Bangor Water District received authority to control and operate the city-owned water system and received title to the water system and its appurtenances.4/ However, P. & S.L. 1957, c. 39 expressly reserved title to the Bangor dam, dam site or any city-owned electric generating machinery and equipment to the City of Bangor and provided that the city would have continuing authority to use this machinery and equipment without obligation to the District. In 1977 the Bangor dam was breached and presently remains in a state of disrepair, unusable for hydropower generation purposes.5/

Given this factual background, you have posed the following questions concerning L.D. 2048:

1. Will this legislation have any effect on the reconstruction, repair, rehabilitation, maintenance, or operation of the Bangor Dam, an existing dam structure located within the area in question?

2. If this legislation would have an effect on the Bangor Dam so as to prohibit its future reconstruction, repair, rehabilitation, operation and maintenance, doesn't the legislation violate the U.S. Constitutional Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law?

3. Because the bill doesn't apply to the entire river, doesn't it violate the Equal Protection protections of the

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1/ See, History of Penosbcot County, Maine (1882) p. 751 (opinion request attachment).

2/ Subsequently amended by: P. & S.L. 1876, c. 260; P. & S.L. 1880, c. 210; P. & S.L. 1901, c. 380; P. & S.L. 1927, c. 73; and P. & S.L. 1957, c. 39.

3/ Preamble, L.D. 1982, No. 1800.

4/ P. & S.L. 1957, c. 39.

5/ Preamble, L.D. 1982, No. 1800, "An Act to Amend the Law Enabling the Supply of Water to the City of Bangor."

Fourteenth Amendment, by imposing special burdens on the City of Bangor not imposed on the owners or developers of other dams on the river; or the owners of causeways, wharves, piers, etc. in the affected areas which are exempted?

4. Because the bill does not make provision for dams with working fishways, lifts, etc. which would permit fish to freely travel up the river, isn't it a denial of Equal Protection guarantees under the Fourteenth Amendment?

5. Because this proposed law does not exempt existing dam structures within the affected area and their operators from its prohibitions and penalties, doesn't it violate the provisions of Art. I, § 10, United States Constitution and Art. I, § 11, State of Maine Constitution which prohibit the adoption of ex post facto laws?

6. Doesn't the proposal constitute an unlawful impairment of the obligations imposed under the private legislation cited above which constitutes a "franchise" granted by the Legislature? Doesn't the proposal constitute an unlawful impairment of the obligations imposed under an existing agreement between the City and Swift River Company regarding the rehabilitation, operation and maintenance of the Bangor Dam, and thus violate the provisions of Art. I, § 11, State of Maine Constitution, and Art. I, § 10, U. S. Constitution?

Analysis:

Turning to your first question, you ask whether this legislation will have any effect on the reconstruction or operation of the Bangor dam. Clearly, the reconstruction, repair or operation of the Bangor Dam would be prohibited by the express terms of the bill:

> . . . no person, firm, corporation or other legal entity may erect, operate or maintain any dam which obstructs or restricts the flow of water in the section of the Penobscot River from the Bangor Hydroelectric Company Dam located at Veazie to the southernmost point of Verona Island.6/

In your second question, you inquire as to whether the proposed legislation violates the Fifth and Fourteenth

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6/ The definition of the term "maintain" as used in this bill is unclear. If the term is construed broadly, it might require the dismantling of the breached remains of the Bangor dam, as the remains could restrict or obstruct the flow of the river. Should the Legislature choose to enact this bill, we think this term should be clarified.

Amendments of the United States Constitution concerning the taking of property without compensation and the deprivation of property without due process of law. It is clear that the proposed legislation does not violate any federal constitutional provision. The federal courts have ruled that a municipality may not raise a claim under the Fifth or Fourteenth Amendment of the United States Constitution against a law of the State which created the municipality.7/

The proposed legislation may, however, violate the State of Maine Constitution. Article I, section 21 of the Maine Constitution provides:

> Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.

Although there is no judicial precedent in Maine concerning compensation requirements in state condemnation of municipal property, other states have ruled that municipalities must be compensated for takings of municipal property held in a "private", as opposed to a "public", capacity. In general, where municipalities hold property in a purely governmental capacity, for public purposes, municipalities are not entitled to compensation when such "public-purpose" property is condemned by the state. However, with respect to property held in a "proprietary" or private capacity, the prevailing rule is that municipalities are entitled to compensation.8/

Research has disclosed no case in which the status of a municipally-owned dam was determined to be governmental or proprietary for the purposes of state condemnation. However, in view of the trend of cases not involving dams, it is highly likely that a municipally-owned dam is"proprietary" in nature and thus potentially protected by the taking clause of the Maine Constitution. The question then becomes whether the prohibitions contained in the proposed legislation so restrict the City's use of the structure in the Penobscot River as to

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7/ Hunter v. Pittsburgh, 207 U.S. 161, 178-179 (1907); City of Boston v. Massachusetts Port Authority, 320 F. Supp. 1317, (U.S.D. Mass. 1971); affirmed 444 F.2d 167 (1st Cir. 1971); Commissioners of Highways of the Towns of Annawan, et al. v. U. S. et al., 466 F. Supp. 745 (N.D. Ill. 1979).

8/ City of Cambridge v. Commissioners of Public Welfare, 257 N.E.2d 782, 783 (1970); Nichols, Eminent Domain, § 2.225 and § 5.9.

amount to a taking.[9/] In this regard, it is important to understand that not all restraints on the use of property will be found to violate the taking clause. As the Supreme Judicial Court of Maine has observed, ". . . the constitutionally protected right to property is not unlimited. It is subject to reasonable restraints and regulations in the public interest." State v. Johnson, 265 A.2d 711, 714 (Me. 1970). The courts, however, have found it impossible "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). Each case, therefore, turns upon the result of the court's inquiry into the substantiality of the diminution of value.

In its recent interpretation of the taking clause of the United States Constitution, the Supreme Court of the United States has required that such a diminution be very substantial before a "taking" will be found. For example, in the important case of Goldblatt v. Hempstead, 369 U. S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962), the Court sustained a local prohibition on excavating below the water table which had the effect of putting an existing sand and gravel operation out of business.

9/ In so defining the question, we are cognizant that in addition to the dam, there are three other property "rights" whose extinguishment could require compensation if a court were to find that the property right existed and that the legislation amounted to a taking of that property right. These are: the franchise granted to the City to construct a waterworks and, arguably, a hydroelectric facility; any grant of a right to use the waters of the State, over which the State holds a navigational servitude, for the project; and ownership of the submerged lands beneath the dam. As to the first of these, however, it is most unlikely that such a franchise would be considered "private" compensable property in light of the power of the Legislature to alter or amend the charter of a municipal entity at any time, without compensation. City of Biddeford v. Biddeford Teachers Ass'n., 304 A.2d 387 (Me. 1973); Burkett v. Youngs, 135 Me. 459 (1938). As to the second, we offer no view except to say that since the rights involved are essentially public in nature, it would seem unlikely that a court would require compensation for their transfer from one public entity to another. As to the third, it is impossible for us to answer without knowing whether the lands in question are owned by the State or the City of Bangor. This question is complicated not only by the need to determine whether the submerged lands lie within tidal waters, but also by the possibility that 38 M.R.S.A. § 559 et seq. (P.L. 1981, c. 532) conveyed the filled submerged lands beneath the dam to the City of Bangor.

In the Penn Central case, cited above, the Court found that the City of New York did not take the property of the owner of Grand Central Station when it prohibited it from tearing the station down and erecting a vastly more profitable building in its place. In its 1979 term, the Court addressed the "taking" clause no fewer than four times, but invalidated the governmental action in question only when an actual physical invasion had occurred. Compare Kaiser Aetna v. United States, 444 U. S. 164, 175-80 (imposition of nagivational servitude constituted a physical invasion and, therefore, a taking) with Agins v. Tiburon, 447 U. S. 255 (limitation of previously purchased land to use for one acre single family homes not a taking); Prune-Yard Shopping Center v. Robins, 447 U. S. 74, 82-85 (extinguishment of shopping center's ability to exclude others not a taking); and Andrus v. Allard, 444 U. S. 51, 64-68 (1979) (prohibition of commercial transactions involving artifacts not a taking). In each of these cases, the Court was careful to note that since ownership consists of a "bundle" of property rights, the mere extinguishment of one of those rights does not necessarily amount to a taking without compensation. The question, rather, is whether the right in question constitutes, in the words of Justice Powell in Agins, "a fundamental attribute of ownership," Agins v. Tiburon, supra, 447 U. S. at 262, such that its extinguishment would render the property[10/] substantially useless. That determination requires close analysis of the facts of each case. It appears that the Supreme Court of the United States is not inclined to find a taking where a mere diminution in value has occurred. Absent a physical invasion, the property will have to be rendered substantially useless before a taking will be found to occur.

Applying these principles to the case at hand, there are several undetermined factual questions which would govern whether the enactment of L.D. 2048 would constitute a taking without just compensation. The resolution of the problem, in our view, would depend on the present condition of the dam, the extent of repairs necessary to enable the operation of the dam as part of a municipal water system or a hydroelectric

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10/ It should be emphasized that in determining what kinds of interests are to be considered "property" for purposes of the "taking" clause, the Supreme Court has been most explicit that the opportunity to use property for future profit is not such a fundamental attribute of ownership as to require compensation for its extinction. Thus, in Andrus v. Allard, supra, the Court said, "loss of future profits . . . provides a slender reed upon which to rest a taking claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." Id. at 66. See also Ace Ambulance Service, Inc. v. City of Augusta, 337 A.2d 661, 667 (Me. 1975).

generating facility, and the value of the dam when used for purposes of a municipal water system apart from hydroelectric generation.[11/] A comparison of two extreme situations serves to illustrate the importance of these factual determinations. On one hand, if a fully functioning hydroelectric dam were operating on the site, the prohibition on operating a dam would require compensation since the Legislature would be prohibiting the only use of the structure. On the other hand, if there were no structure at all, any restriction on building one would probably not require the payment of compensation since the Legislature would merely be prohibiting one possible use of the property. Against this framework, the present condition of the Bangor dam and the steps necessary to make it operational would become important factors in determining whether compensation would be required. Obviously the issue of compensation could become the subject of extensive litigation between the State and the City of Bangor if this bill were enacted.[12/]

In your third and fourth questions, you ask whether L.D. 2048 violates the Equal Protection Clause of the federal and State constitutions by imposing special burdens on the City of Bangor vis a vis other Penobscot River dam owners, and wharf or pier owners. As explained in the answer to the second question, the proposed legislation does not violate any federal constitutional provision.[13/] Even assuming the applicability of the state constitutional provision, there is no evidence that the Legislature's imposition of a dam moratorium in the Lower Penobscot River involves any irrational classifications, unrelated to legitimate state concerns of fisheries conservation and public navigation rights.[14/]

In your fifth question you inquire as to whether the proposed legislation violates the United States (Article I, § 9) and Maine (Article I, § 11) constitutional guarantees

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11/ We note the possibility that the City of Bangor's failure to maintain and operate the dam as a hydroelectric generating facility may have eliminated hydroelectric generation as an "existing use" of the dam, thereby rendering hydrodevelopment merely a speculative future use for profit, which speculative use is not compensable. See footnote 10, supra.

12/ Resolution of the case of Seven Islands, et al. v. Charles Blood, et al., Maine Law Court docket number Law-81-71, argued September 10, 1981 and now awaiting decision by the Maine Supreme Judicial Court, concerning an unrelated taking by the State, may serve to clarify state eminent domain powers in this area.

13/ See footnote 7, supra.

14/ McGowen v. Maryland, 366 U.S. 420 (1961); State v. Norton, 355 A.2d 607 (1975).

against adoption of ex post facto laws.[15/] The legislation does not appear to be an ex post facto law as it is solely prospective in application. Even if the legislation were to require the dismantling of the dam, and to impose criminal sanctions for failure to remove the dam, the exclusively prospective application of the legislation avoids any violation of the ex post facto provision. Calder v. Bull, 3 Dall 386 (1798); In re Stanley, 133 Me. 91, 174 A.93 (1934), affirmed Stanley v. P.U.C. of Maine, 295 U.S. 76 (1935).

In your sixth question, you inquire as to whether the proposed legislation violates the United States and Maine constitutional guarantees against impairment of contracts by impairing a "franchise" granted to Bangor and an "existing agreement between the City and Swift River Company" concerning rehabilitation and operation of the Bangor dam. With regard to the "franchise," it is clear that the State has the power to alter the charter or powers of one of its political sub-divisions at any time, and therefore the proposed legislation does not impair a contract between the State and a municipality. City of Biddeford by Board of Education v. Biddeford Teachers Ass'n., 304 A.2d 387 (Me. 1973); Central Maine Power Co. v. Waterville Urban Renewal Authority, 281 A.2d 233 (Me. 1971).

As to the possible impairment of an "existing agreement" between Swift River Company and the City of Bangor, it is impossible for this office to offer any firm advice without an opportunity to review the agreement and its contents.[16/] In the most general manner, we can advise you that the federal courts have held that, in the absence of a state attempt to modify its own financial obligations or to advance a policy to repudiate debts, destroy contracts or the means to enforce them, the states possess "broad power to adopt general regulatory measures without being concerned that private contracts will be impaired or even destroyed, as a result." United States Trust Co. v. New Jersey, 431 U. S. 1 (1976);

15/ The proposed legislation would be codified at 38 M.R.S.A. § 418-A and therefore could be enforced pursuant to 38 M.R.S.A. § 349(1) and (2) which provide for criminal and civil penalties.

16/ We do not address the possible invalidity of the City of Bangor-Swift River Company hydropower development contract as an ultra vires exercise of the City's authority. The City of Bangor's authority to develop the dam site for hydropower and to convey those hydropower rights is questionable in light of the limited authority originally granted to Bangor through P. & S.L. 1875, c. 138, and subsequent amendments.

Kargman v. Sullivan, 582 F.2d 131 (1st Cir. 1978).[17] Thus, it is possible that the proposed legislation may qualify as a valid attempt to protect the State's public trust interests in natural resource preservation and navigation, in spite of any incidental effects on the Bangor-Swift River agreement. However, the contract impairment issue is likely to become the subject of a legal challenge of uncertain result if the proposed bill is enacted.

We must add a vitally important final note to this Opinion. The proposed legislation may be rendered unenforceable in the event that the Federal Energy Regulatory Commission (FERC) were to issue a license to any person for hydrodevelopment at the Bangor dam site pursuant to the Federal Power Act (16 U.S.C. § 791a). The State of Maine's existing interest in navigation and natural resources protection on the Lower Penobscot River, a navigable river, would likely be preempted if the federal government chose to exercise its dominant powers under the Commerce Clause of the United States Constitution (Article I, section 8, clause 3), to regulate navigation or authorize hydropower development on a navigable waterway. First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946). Of course, the State of Maine, through its Attorney General, could intervene in any Federal Energy Regulatory Commission licensing proceeding to try to ensure protection of the Atlantic salmon fishery, but if FERC were to grant a license, the State's powers to prevent dam construction pursuant to the FERC license would be lost.

I hope this Opinion will be of assistance to you in consideration of L.D. 2048. If I can be of any further assistance, please do not hesitate to call upon me.

Sincerely,

JAMES E. TIERNEY
Attorney General

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17/ Compare, First National Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, 136 A.2d 699 (1957) (state action held to be an unconstitutional impairment of contracts where it directs that money raised by a governmental authority pursuant to a bond indenture be expended in a manner inconsistent with the terms of the bond indenture).