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Richard E. Barringer, Chairman
Land and Water Resources Council
State Planning Office
Augusta, Maine 04333

Dear Mr. Barringer:

On behalf of the Land and Water Resources Council, you have requested an opinion from this office concerning the legal parameters of hydropower development in the State of Maine. Your questions are:

1. Does the State of Maine hold the waters of the State and the lands submerged beneath great ponds and tidal waters in trust for the people of Maine, subject to the requirements of the Public Trust Doctrine?

2. If so, what are the limitations imposed upon the State of Maine by the Public Trust Doctrine when authorizing the use of waters and submerged lands by private developers of hydropower generation sites?

3. Must the State of Maine, consistent with the Public Trust Doctrine, require private parties to obtain a lease or other authorization for use of waters and submerged lands, in addition to any applicable environmental permits?

4. Can the State of Maine constitutionally amend or rescind past authorizations to private parties for use of waters and submerged lands where those authorizations were granted in the form of corporate charters in Private and Special Laws?

I. State Interest in Waters and Submerged Lands

In response to your first question, the State of Maine holds certain lands and waters in trust for the people of Maine. The nature of competing private and public rights in such waters and lands of Maine is most easily analyzed within the framework of five separate categories: lands beneath the ocean and tidal rivers, lands beneath great ponds, lands in the intertidal zone, lands beneath non-tidal rivers, and the waters of the State.

A. Lands submerged beneath the ocean and tidal rivers

Lands submerged beneath the ocean and the tidal[1] rivers of the State are held in trust for the public by the State of Maine. Opinion of the Justices, 437 A.2d 597, 605 (Me. 1981) (hereinafter cited as "1981 Opinion of the Justices"). Except with regard to the intertidal zone, discussed below, the riparian owner along such lands has no interest in or right to use them which is greater than that of any member of the general public.

B. Lands beneath great ponds

Similarly, the State of Maine holds submerged lands of great ponds in the trust for the people of Maine. As defined in the Colonial Ordinance of the Massachusetts Bay Colony, 1641-47, which has since been incorporated into the common law of Maine, 1981 Opinion of the Justices at 605-06, a great pond is one greater than ten acres in size in its natural state, Flood v. Earle, 145 Me. 24, 28 (1950), and a riparian owner's right to use the land beneath it is no greater than that of the general public.

C. Lands in the intertidal zone

Title to the land within the intertidal zone,[2] under the Colonial Ordinance of 1641-47, is held by the riparian owner, but is subject to such public use rights as fishing, fowling and navigation. See 1981 Opinion of the Justices at 605. As trustee of these public use rights in the intertidal zone, the Legislature, or its authorized delegee, is the sole authority empowered to sanction abridgement of these public use rights. Id.

D. Lands beneath non-tidal rivers

The riparian owner on a non-tidal river owns the adjacent submerged land to the middle of the river, thereby precluding

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1/ "Tidal waters" may be defined as a body of water affected by tidal action. In Lapish v. Bangor Bank, 8 Me. 85 (1831), the Court held that waters may be tidal, so long as they are subject to the ebb and flow of the tide, regardless of the fact that the waters are fresh, as opposed to salt. See also Stone v. Augusta, 46 Me. 127, 137 (1858).

2/ The intertidal zone is generally defined by the Colonial Ordinance as all land between natural high watermark and either 100 rods seaward or natural low watermark, whichever is closer to natural high watermark. 1814 Edition of Ancient Charters and Laws of the Colony and Province of Massachusetts Bay, at 148.

State ownership of such land, except in a riparian capacity. Central Maine Power Co. v. Public Utilities Commission, 156 Me. 295, 327 (1960); Brown v. Chadbourne, 31 Me. 9 (1849). The State, therefore, has no rights to the use of such land, nor does the public.

E. Waters of the State

The waters of the State, whether located in tidal areas, non-tidal areas or great ponds, are held in trust by the State for the use of its people. Riparian owners, therefore, may not use such waters in such a manner as to be inconsistent with the rights of the public, absent legislative authorization. Two[3/] principal public uses require special explanation: navigation and diversion for power generation purposes.

1. Navigation.

The public has the right to navigate on those waters of the State, whether tidal or non-tidal, which are of sufficient size in their natural state to float boats or even logs. A riparian owner may not, therefore, obstruct this public right without legislative authorization Stanton v. Trustees of St. Joseph's College, 233 A.2d 718, 720-21 (Me. 1967); Brown v. Chadbourne, 31 Me. 2, 9 (1849); Wadsworth v. Smith, 11 Me. 278 (1834).

2. Diversion for power purposes

A riparian owner along tidal or non-tidal bodies of water, while having no ownership interest in the waters, is nonetheless "entitled to the reasonable use and enjoyment" thereof, "taking into consideration a like reasonable use . . . by all other proprietors above or below him." Lockwood Co. v. Lawrence, 77 Me. 297, 316 (1885), quoted in Stanton v. Trustees of St. Joseph's College, supra; Charles Wilson & Son v. Harrisburg, 107 Me. 207 (1910) (tidal river). A riparian owner, therefore, may divert the water of a river to his own use for the purpose of generating hydroelectric power, so long

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3/ There is at least one other significant public use right: that of fish passage. Central Maine Power Co. v. Public Utilities Comm'n, 156 Me. 295, 327 (1960); Opinion of the Justices, 118 Me. 503, 507 (1919); Wadsworth v. Smith, 11 Me. 281 (1834).

as such diversion does not interfere with the public rights of navigation or fish passage or the use rights of other riparian owners,[4/] who hold a property interest in the quality and quantity of the water. Opinion of the Justices, 118 Me. 503, 506-07 (1919).

II. The Public Trust Doctrine

In your second question you inquire as to the limitations imposed by the Public Trust Doctrine upon legislative authorization of the use of the waters of the State and the land submerged beneath tidal waters and great ponds. This question was discussed by the Justices of the Maine Supreme Judicial Court in the 1981 Opinion of the Justices, supra. In that case, the Justices first observed that where lands and waters are owned by the State or are impressed with a public use right, the Legislature, as trustee for the public, has the constitutional responsibility to manage such lands and waters for the benefit of the public. Id. at 606. Relying upon the "Legislative Powers Clause" of the Maine Constitution, (Article IV, pt. 3, § 1) the Justices then set forth the standard for review of any exercise of legislative power pursuant to the public trust responsibilities:

> . . . we recognize that the Legislature's powers, though broad, are subject to the three-fold limitation that its enactments be 'reasonable', be 'for the benefit of the people', and not be repugnant to any other provision of the Maine or United States Constitution. Id.

The Court emphasized, however, that the reasonableness of any particular legislative enactment would vary with the subject matter of the bill under review:

> Whether a particular piece of proposed legislation is 'reasonable for the benefit of the people' can be judged only in light of the particular problem it is designed to address, the relevant factual circumstances in which it will operate, and the action intended to be taken by it. Id. at 607.

In the case of intertidal and submerged lands, "finite public resources," the Justices held that "a particularly demanding standard of reasonableness" would be required. Id. It is thus reasonable to expect that an identical "demanding" standard would be applied to any legislative enactment allocating the waters of the State or the lands beneath tidal rivers or great ponds for use as hydropower generation sites.

4/ See note 5, infra.

III. Requirement of Express Legislative Authorization to Use Lands and Waters Held in Trust by the State

Your third question raises the issue of whether the State of Maine, consistent with the Public Trust Doctrine, must require private parties to obtain a lease or other authorization for the use of the waters and lands submerged beneath tidal waters and great ponds, in addition to any applicable state environmental permit.

It is clear that express legislative authorization,5/ whether in the form of a charter, lease or deed, is at least necessary for a private party to acquire use rights or title to lands and waters held in trust by the State. 1 M.R.S.A. § 3; Boothbay Harbor Condominiums v. Department of Transportation, 382 A.2d 848 (Me. 1978). Moreover, the conveyance of State-owned lands and waters must be evidenced by express conveyance language. Id. at 855. The Supreme Judicial Court of Maine has ruled that a private person cannot acquire title to State-owned lands and waters by adverse possession. United States v. Burrill, 107 Me. 382, 387 (1910). Similarly, the Court has ruled that public rights or easements in public or navigable waters cannot be extinguished by adverse possession. Knox v. Chaloner, 42 Me. 150 (1856); Treat v. Lord, 42 Me. 552 (1856).

In furtherance of this requirement that express authorization be given before private parties may use public lands and waters, the Legislature has recently delegated authority to state agencies to lease submerged lands and

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5/ Note should be taken of the so-called "Mill Act," 38 M.R.S.A. § 651 et seq., which, generally, authorizes any person "upon his own land to erect a water mill and dam to raise water for working it upon or across any stream not navigable by paying compensation for all flowage damages caused thereby." Opinion of the Justices, 118 Me. 503, 516 (1919). In effect, this permits one person to take the land of another by the mere payment of damages. It should also be noted that the Justices observed in the same Opinion that, although the validity of the Mill Act seems secure, in large part due to its long being acquiesed in as the policy of the State, "[w]ere it a new proposition, its constitutionality might well be doubted." Id. at 517.

exclusive rights to engage in aquaculture in submerged lands or in the intertidal zone to private parties for a specified period of time. Leasing procedures for submerged lands may befound at 12 M.R.S.A. § 558; aquaculture procedures are at 12 M.R.S.A. § 6072. It is important to note that neither of these leasing provisions preempts the need for applicable environmental or regulatory permits by other appropriate state agencies before activities can commence on the leased property.6/ Indeed, these statutes require both a lease and an environmental permit as a prerequisite for the conduct of aquaculture or other activities on state-owned lands. The dual requirements of a lease and an environmental permit for such activities are complementary, not duplicative requirements, in that the lease would operate to transfer State property rights in the site, while the environmental permits would regulate the manner in which the activities were to be carried out on the site.

IV. Extinguishment of Past Authorizations

In your fourth question, you inquire as to whether the State of Maine can constitutionally amend or rescind past authorizations to private parties for use of waters and lands submerged beneath tidal waters and great ponds, where those authorizations were granted in the form of corporate charters In Private and Special Laws. The constitutional question is whether such an extinguishment of authority would so impair vested rights as to amount to a taking of property without

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6/ See 12 M.R.S.A. § 558(4) which provides for consultation between state bureaus in drafting the lease provisions and permits issuance of the lease to be conditioned upon issuance of environmental permits. Similarly, even if a person were to obtain an aquaculture lease pursuant to 12 M.R.S.A. § 6072, the lessee would have to obtain another permit under 12 M.R.S.A. § 6071 in order to introduce or import for introduction any live marine organisms. Thus, the aquaculture lessee may need to obtain more than just a lease in order to conduct aquaculture activities on leased state lands.

compensation, in violation of the Fifth Amendment of the United States Constitution and Article I, Section 21 of the Maine Constitution. It is extremely difficult for this office to respond to this question in the absence of reference to specific charters or factual circumstances. Therefore it must be understood that our generalized response may not be applicable in particular, specialized circumstances.

In general, the Legislature's ability to amend or rescind a corporate charter authorizing construction and maintenance of a dam is determined by the language of the charter. If the charter contains a clear expression of intent to convey State-owned lands upon which, for example, a dam has been built, then the dam owner has acquired title to those lands and the Legislature would be unable to withdraw or amend its property conveyance without payment of compensation. However, in those cases where the charter lacks an expression of clear intent to convey title, it would likely be construed as merely a license for construction and maintenance of a dam. In Boothbay Harbor Condominiums, Inc. v. Department of Transportation, 382 A.2d 848 (Me. 1978), the Supreme Judicial Court held that a Private and Special Law which granted a private corporation "authority to build and maintain a dam" on submerged lands beneath navigable, tidal waters did not contain express language conveying title in the site to the corporation, and, therefore, the charter constituted only a license to construct a dam:

> "The State may grant title by resolve, if the resolve contains words of grant, release, or confirmation, or a clearly expressed intent to make a conveyance of title at that time. Cary v. Whitney, 48 Me. 516 (1860). Here, there is no evidence of such a resolve. The Referee determined, and we agree, that the language of P. & S.L. 1879, Chapter 111 merely granted Maine Ice Company a license to build and maintain the dam. 'A license creates no interest in land . . . .' Reed v. A. C. McLoon & Company, 311 A.2d 548, 552, n. 7 Me. (1973)." Id. at 855 (footnote omitted).

While a charter, or "license" is not generally understood as conveying compensable property rights, Sinclair Pipe Line v.

United States, 287 F.2d 175 (Ct. Cl. 1961), improvements placed upon the land in reliance on the license may be compensable.7/ In Brusco Towboat Co. v. State, 589 P.2d 712, 723 (Ore. 1978) the Court held that where a licensee has relied upon an express license to construct permanent improvements on state land, the license may not thereafter be revoked without payment of just compensation for those improvements.

There is, however, precedent in Maine for the amendment without the payment of compensation of a Private and Special Law granting a corporate charter authorizing the use of a river and its waters. In Milo Electric Light and Power Company v. Sebec Dam Co., 109 Me. 427 (1912), the Supreme Judicial Court upheld the constitutionality of a 1905 amendment8/ to an 1866 Private and Special Law which incorporated the Sebec Dam Company and granted permission for that company to raise the height of an existing dam. The 1905 amendment imposed new conditions on the use of waters by the Sebec Dam Company, requiring that the dam gates be kept closed from March 1 to July 1 each year, except that whenever the stored waters of the Sebec Lake were needed for manufacturing, including power, purposes by downstream manufacturing mills, the gates had to be hoisted to the extent required to allow the escape of "sufficient water" therefor. The Court interpreted the 1905 amendment as requiring the hoisting of the gates during the March - July period whenever a downstream manufacturing plant required water to run its mills. The Court further held that while this obligation to release water accrued to the benefit not only of those mills existing at the time of the 1905 amendment, but also all those manufacturing mills which were built downstream at a later date, the Court conditioned this expandable obligation on the provision that power requirements of downstream mills not exceed the production ability of the river when "managed reasonably in the usual manner, or in accordance with the rights acquired by prescription, if such exist." Id. at 431. The Court then concluded that the 1905 amendment was constitutional, in that the amendment, alteration

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7/ See Boothbay Harbor Condominiums, Inc. v. Department of Transportation, supra; Bangor-Hydro Electric Company v. Johnson, 226 A.2d 371 (1967); Southard v. Hill, 44 Me. 92 (1857) for criteria determinative of whether a dam built on State-owned land is personalty or becomes part of the real estate.

8/ The original 1866 Private and Special Law was actually amended a total of three times, in 1899, 1903 and 1905.

or repeal of corporate charters was expressly reserved to the Legislature,[9] and that the 1905 charter amendment neither impaired vested rights of the corporation nor constituted an alteration which was unreasonable, in bad faith, or inconsistent with the object and scope of the act of incorporation.

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I hope this answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,

James E. Tierney

JAMES E. TIERNEY
Attorney General

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[9] Id. The Maine Business Corporation Act, 13-A M.R.S.A. §§ 101 et seq. provides that the Act "shall not apply to any corporation created by special act of the Legislature, to the extent that this Act is inconsistent with such special act." 13-A M.R.S.A. § 103(2). Thus, corporations formed pursuant to Private and Special laws may still be considered to be subject to Legislative amendment of their corporate charters, so long as the law prevailing at the time of their formation allowed the Legislature to alter, amend or repeal their charters. See generally East Boothbay Water District v. Inhabitants of Boothbay Harbor, 158 Me. 32 (1962); First National Bank of Boston v. Maine Turnpike Authority, 153 Me. 131 (1957); State of Maine v. Maine Central, 66 Me. 488 (1877).