JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 7, 1983

Honorable Andrew J. Redmond
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Redmond:

This letter responds to your request for a written opinion concerning possible amendment of the Tree Growth Tax Law, 36 M.R.S.A. § 571, et seq. This law provides for valuation of timberland for property tax purposes according to its current use as allowed by a 1970 amendment of Article IX, section 8 of the Maine Constitution. The practical effect of this law is to reduce the property tax burden to forest landowners in the State of Maine who fall within its terms. You have asked whether it would be constitutionally permissible to condition the benefits of the Tree Growth Tax Law upon the processing of sawlogs and pulpwood within the State. For the reasons set forth below, it is the opinion of this Office that such an amendment would constitute an impermissible burden upon interstate and foreign commerce under the Commerce Clause, article 1, section 8, clause 3 of the United States Constitution, and would also be violative of the import-export clause, article 1, section 10 of the United States Constitution.

The pertinent facts, as we understand them, are as follows. Businesses which process Maine timber, both domestic and foreign, resident and nonresident, may have production facilities within the state as well as facilities in other states and in foreign countries, principally Canada. The capital investment in production facilities is large. The location of production facilities is governed by the type and

location of available timber and other considerations, principally economic. In some portions of Maine, for example the northwestern section of the State, the natural market for timber involves purchasers whose production facilities are located in Canada.

The United States Constitution, Article I, section 8, clause 3 vests in Congress the power to regulate commerce among the states and with foreign countries; it does not expressly provide, however, what the states may or may not do in the absence of Congressional action. The United States Supreme Court however, has interpreted the clause to mean that the state's authority to regulate commerce is concurrent with federal authority provided that the state statute regulates in a manner that does not discriminate against interstate or foreign commerce in effecting a legitimate local public interest, and that its effects on such commerce are only incidental. If the statute discriminates against interstate or foreign commerce, it will be sustained only if the local interest involved is strong and if that interest cannot be promoted as well with a lesser impact on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). The courts generally attempt to balance the local benefit against the correlative burden on interstate commerce. Parker v. Brown, 317 U.S. 341 (1943).

State statutes discriminating against outgoing commerce by burdening the exportation of local products have been treated as the equivalent of embargoes; such embargoes may be upheld only if they represent the least burdensome alternative to achieve a legitimate local goal. The Supreme Court has accorded great weight to legitimate local health and safety concerns in decisions, Southern Pacific Co. v. Arizona, 325 U.S. 761, 796 (1945) (Douglas, J., dissenting), but although it has recognized that a state has a legitimate interest in maximizing the financial return of local industry, Parker v. Brown, supra, the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could be performed more economically outside the state. Even where the state has pursued a clearly legitimate local interest such as the fostering of local industry, this type of burden on interstate commerce has been held to be virtually per se unconstitutional. Pike v. Bruce Church, Inc., supra; Toomer v. Witsell, 334 U.S. 385 (1948); Johnson v. Haydel, 278 U.S. 16 (1928); and Foster-Foundation Packing Co. v. Haydel, 278 U.S. 1 (1928).

The proposed amendment to the Tree Growth Tax Law has as its purpose the preservation and securing of employment for State industry. This purpose would be effected though the imposition of a higher property tax on forest lands the timber from which is shipped out of state for processing. The practical operation of the amendment would be to increase the cost of timber to purchasers processing the wood outside of Maine and to induce those purchasers to divert the processing business to the State despite their investment in processing facilities located outside of Maine. In Toomer v. Witsell, supra, the Supreme Court invalidated a South Carolina statute requiring the owners of shrimp boats licensed by the State to fish in the maritime belt off South Carolina to unload and pack their catch in that State before shipping or transporting it to another State. The Court stated:

> [A]n inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry. 334 U.S. at 403-404.

It is the conclusion of this Office that the proposed amendment would be discriminatory as to producers operating production facilities outside of Maine and would therefore impose an unconstitutional burden on interstate and foreign commerce.

Moreover, in addition to violating the Commerce Clause, the increased tax burden on foreign commerce affected by the amendment would, in substance, be a duty on exports although it may be denominated a property tax. See generally United States v. Hvoslef, 237 U.S. 1 (1915); Fairbank v. United States, 181 U.S. 283 (1901); and Brown v. Maryland, 25 U.S. 419 (1827). As such, it would be an invalid duty on exports under article 1, section 10 of the United States Constitution.*/

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*/ In view of this office's conclusions set forth above, we have not discussed the administrative and enforcement problems which could arise from implementation of the proposed amendment.

I hope this response adequately answers your inquiry. Please feel free to make further inquiry if clarification is needed.

Sincerely,

JAMES E. TIERNEY
ATTORNEY GENERAL

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