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June 19, 1992

John Williams, Executive Director
Maine Low-Level Radioactive Waste Authority
99 Western Avenue
Suite 6
P.O. Box 5139
Augusta, Maine 04332-5139

Dear John:

This is in response to your opinion request of May 28. In that request, you inquire whether your agency must comply with certain ordinances adopted by the Towns of Pittston and Edinburg and by the Plantation of Garfield. By their terms, these ordinances broadly constrain and/or regulate the activities of the Authority with respect to investigations preliminary to the selection of a site for the disposal of low-level radioactive waste. In addition, these ordinances broadly prohibit the actual disposal of such waste. While the ordinances of Edinburg and Garfield Plantation are substantially alike, that of Pittston provides a much more intricate legal framework with respect to the process by which the Town would review and determine whether to approve the Authority's site investigation work within that Town.

In the response that follows, the focus is upon the applicability of these ordinances to the site investigation work of the Authority, since it is apparent that the Authority's need for advice on this issue is immediate. The principal focus will also be upon the Pittston ordinance since, of the three, this one raises the most serious issues with respect to the work of a State agency. Finally, this office has some advice which it wishes to convey to the Authority regarding executive sessions when used to deliberate upon Authority policy decisions.

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## I. THE AUTHORITY'S STATUTORY MANDATE

The Maine Low-Level Radioactive Waste Authority is a State agency established by the Legislature in 1987 to carry out the purposes of the Maine Low-Level Radioactive Waste Authority Act (hereinafter the "Authority Act"). 38 M.R.S.A. §§ 1501 et seq. The Authority Act was created in response to federal law that mandates that states must assume responsibility for the disposal of low-level radioactive waste generated within their borders. United States Low-Level Radioactive Waste Policy Act of 1980, P.L. 96-573 as amended, 42 U.S.C.A. §§ 2021 et seq. See 38 M.R.S.A. § 1502. As contemplated by federal law, the Authority Act gives your agency the responsibility, if necessary, to provide for the planning, siting, construction, operation, maintenance and closure of facilities deemed necessary to dispose of or store low-level radioactive waste generated within Maine and for which the State is responsible. Id. In accordance with federal law, there is a timetable by which each state must progress in these efforts. 42 U.S.C.A. § 2021e.

As described in your letter, in order to carry out this legislative mandate the Authority is currently involved in a screening process to identify and study possible sites for locating a low-level radioactive waste storage or disposal facility in Maine. The Authority has option contracts with landowners who are willing to offer their land for study and/or siting of such a facility. In order to evaluate lands for this purpose, as your letter states, the Authority must conduct technical tests and evaluations of these properties. The Authority wishes to undertake evaluations of sites in Pittston, Edinburg and Garfield Plantation, among other locations around the State. Your letter indicates that the site investigation work that is contemplated consists of walkovers by teams of experts to identify geological and natural features, as well as seismic soundings and test well drillings involving two-inch diameter borings. According to your letter, with the possible exception of these test wells, the site investigation work that you contemplate will have no impact on the environment.

## II. THE PITTSTON ORDINANCE

In April 1992, the Town of Pittston enacted "An Ordinance Relating to the Siting, Storage and Disposal of Low-Level and High-Level Radioactive Waste within the Town of Pittston" (hereinafter referred to as the "Pittston Ordinance"). The stated purpose of the Pittston Ordinance is to "protect the health, safety and welfare of the citizens of Pittston; enhance

and maintain the quality of the environment; conserve natural resources; prevent groundwater, surface water and air pollution; and preserve property values and the tax base within the Town of Pittston." Pittston Ordinance, § 2. The Ordinance states that it was adopted pursuant to the municipal home rule authority set forth in Article VIII, Part II, § 1 of the Constitution of the State of Maine and 30-A M.R.S.A. § 3001. Pittston Ordinance, § 3.

The Pittston Ordinance has essentially two features which are of potential significance to the work of the Authority. First, the Ordinance prohibits the storage and disposal of radioactive waste within the Town. Pittston Ordinance, § 4(A). Second, the Ordinance prohibits any site investigation work, undertaken in contemplation of the siting of a radioactive waste storage or disposal facility, except as allowed by a permit from the Town Planning Board. Pittston Ordinance, § 4(B). Site investigation work that is subject to permitting includes "any testing, digging, drilling, geologic research or other site assessment, investigation or characterization activities." Id. In other words, by the Ordinance's terms, its permitting requirements apply to any form of on-site examination.

The Pittston Ordinance provides an intricate permit application and review process in order to undertake site investigation work. An application must be filed in triplicate with the Planning Board together with a filing fee of $100. Pittston Ordinance, § 5(A)(1). The Planning Board then has 30 days to determine whether the application is complete. Id. Once a determination of completeness is made, the Planning Board must hold a public hearing within 60 days. Id., § 5(A)(3). Within an additional 60 days following the public hearing, the Planning Board must approve, approve with conditions or disapprove the application. Id., § 5(A)(4).

The Ordinance provides that the permit application must describe, among other things, the proposed site investigation locations, methodology, personnel and records. The application must also include an analysis of any environmental impact of the proposed investigation, a description of the compatibility with or impact upon neighboring land uses, a description of any impact on property values or the tax base of the Town, as well as an analysis of whether the proposed site investigation activities are consistent with the purposes of the Ordinance. Pittston Ordinance, § 5(A)(2).

Under the Ordinance, the Pittston Planning Board's approval of an application to undertake site investigation work hinges upon an affirmative finding that certain criteria are met: among these, that the "site assessment activity will not result in environmental degradation either in the short or long-term and will not result in negative impacts on property values or municipal tax base"; that the "site assessment activity will be conducted according to a methodical, consistent, open and dependable process"; that "the results of the ... site assessment activity will be made available to the public in a timely manner"; and that "the purpose of such activity is consistent with the purposes of this Ordinance." Pittston Ordinance, § 5(A)(4). While the Pittston Ordinance ostensibly applies to site investigation work undertaken by the State, it provides a qualified exemption for such work undertaken by the Town. Id., § 6.

**III. THE EDINBURG AND GARFIELD PLANTATION ORDINANCES**

The Ordinances adopted by Edinburg and Garfield Plantation are substantially alike. Both ordinances prohibit the disposal of any radioactive waste within the municipality. Edinburg and Garfield Plantation Ordinances, § 3(A). Both Ordinances also prohibit any "testing or drilling" pertaining to the potential siting of a nuclear waste repository. Id., § 6. Finally, both Ordinances provide for an exception to these stated prohibitions to be voted on by "all registered voters." Id., § 3(B). Presumably, this "exception" would require a vote tantamount to amending the Ordinance itself.

In other words, the virtually identical Edinburg and Garfield Plantation Ordinances are substantively different from the Pittston Ordinance in that the former prohibit site investigation work, whereas the latter provides a structured review and permitting process by the Town Planning Board for such activities. All three ordinances are essentially similar in their prohibition of the actual siting of a low-level radioactive waste facility.

**IV. MUNICIPAL HOME RULE AND ITS LIMITATIONS**

By constitutional provision and statutory enactment, Maine is a home rule state. In general terms, this means that, while municipalities are creations of the State, they are given by Maine law plenary power to enact ordinances to protect the public health, safety and general welfare without the need for specific grants of legislative authority.

In 1988, the Legislature revamped the municipal home rule laws in order to "reemphasize the Legislature's commitment to municipal home rule." L.D. 506, Statement of Fact (113th Legislature 1988), enacted as P.L. 1987 c. 583, now 30-A M.R.S.A. § 3001. This statute sets out the essential framework by which a determination is made whether a specific municipal ordinance may be preempted by operation of State law:

> Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.
>
> 1. Liberal construction. This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.
>
> 2. Presumption of authority. There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.
>
> 3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any State law.
>
> ... .

See Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1189 (Me. 1990); Camden & Rockland Water Co. v. Town of Hope, 543 A.2d 827 (Me. 1988); Mid-Coast Disposal, Inc. v. Town of Union, 537 A.2d 1149 (Me. 1988).

Because the Legislature has not expressly preempted the types of municipal ordinances adopted in this instance, the issue is whether the application of the municipal ordinances to the work of the Authority would "frustrate the purpose of any State law," the standard of implied preemption under the above quoted statute. 30-A M.R.S.A. § 3001(3). If the purpose of

State law would be frustrated, then the municipal ordinances do not apply to the work of the Authority. Otherwise, the ordinances are presumed to apply to the work of the Authority.

## V. ANALYSIS AND OPINION

### A. The Legal Applicability of the Pittston Ordinance to the Site Investigation Work of the Authority.

As described in section II of this letter, the Pittston Ordinance lays out an intricate procedure for municipal review and permit decision-making on all proposed site investigation work, even that which might have no detectable environmental impact. It is true that this process, albeit time consuming for the applicant as well as for the Town, is merely a permitting procedure, rather than the outright prohibition on such activities adopted by Edinburg and Garfield Plantation. Nonetheless, it must be accepted that the Town's assumption of the power to require (and perhaps to deny) the issuance of a permit goes beyond merely soliciting or requiring information of the Authority.[1/] The power to decide whether to issue a permit is also the power to deny it, as the Pittston Ordinance explicitly contemplates. Indeed, the Pittston Planning Board is obligated by the Ordinance to deny a permit if any of the five criteria of review stated in the Ordinance are not met to its satisfaction. Pittston Ordinance, § 5(A)(4). For instance, the Ordinance provides that Pittston's Planning Board must deny a permit application unless it affirmatively approves the proposed method for site investigation. Similarly, a permit application must be denied unless the Town Planning Board affirmatively finds that the activity in question will have no negative impact on property values or municipal tax base. Further, an application must be denied unless the Town Planning Board affirmatively finds that the proposed activity is consistent with the purposes of the Ordinance. While perhaps not explicitly stated in the purpose section of the Ordinance, the overriding substantive purpose of the Pittston Ordinance must be seen as designed to prohibit the disposal or storage of radioactive waste within the Town. Pittston Ordinance, § 4(A).

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1/ This office has already suggested that the Authority make a reasonable effort to informally provide Pittston with the written information that its ordinance solicits. While this measure may not be legally compulsory, it is suggested as an effort to be responsive to the legitimate interests of the Town and, as you have indicated, would not impose a significant burden on the Authority.

Given the broad sweep of site investigation activities encompassed by the Ordinance's permitting requirements, the process and time that the Ordinance provides for Town review and approval (or denial) of an application, together with the criteria of review which are to be applied by the Planning Board in making a permit decision, the potential effect on the Authority's site investigation work must be seen as consequential and possibly significant.

Moreover, and of importance, the Legislature has vested in the Authority, as an agency of State government, both broad and explicit enablement with respect to site investigation activities. The Authority is designated as the State's arm in carrying out the federal mandate to plan for and provide a site, if necessary, for the disposal of low-level radioactive waste. 38 M.R.S.A. §§ 1502, 1521(5). Further, the Authority is expressly empowered to "enter during normal working hours upon any lands, waters and premises in the State for the purpose of making surveys, soundings, drillings, examinations and inspections as it deems necessary." 38 M.R.S.A. § 1521(13). While Pittston contends that this latter provision should be read exclusively and narrowly to deal with the Authority's authorization to enter upon private property without permission of the owner, the language of the statute strongly evinces a legislative intent that the Authority may undertake site investigation work throughout the State as necessary to achieve its legal mandate. In this regard, the words of the Authority's statute could hardly be more powerful.

In the face of this express legislative mandate, it is difficult to find legal support for the applicability of the Pittston permitting scheme to the Authority's proposed site investigation work. This difficulty is aggravated by the fact that the Pittston Ordinance is sweeping in the types of site investigation work that it prohibits without a permit, is consumptive of time and expense, is potentially controlling even with respect to the Authority's chosen methodology of site investigation, and is uncertain in the outcome of its permit review procedure. To put it in a more basic way, is it possible that the Legislature intended each of the more than 400 municipalities of the State, exercising their broad home rule authority, to be able to adopt ordinances requiring diverse permitting procedures in restraint of a State agency's inspection of property with the landowner's consent and acting in pursuit of its expressly stated legislative mandate? Without further direction from the Legislature, we believe that the application of the Pittston Ordinance to the proposed site investigation work of the Authority must be seen as frustrating

the purpose of the Authority Act, and therefore preempted and not applicable to the Authority pursuant to 30-A M.R.S.A. § 3001(3).[2/]

In sum, if one accords full weight to the legislative purpose and mandate stated in the Authority Act, one cannot avoid the conclusion that a municipality may not frustrate that purpose with an ordinance that requires a town planning board permitting process and approval as a precondition to the site investigation work of the Authority.

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2/ Pittston argues that, notwithstanding the Authority's legal enablement to plan for and investigate sites pursuant to sections 1521(5) and 1521(13) of its statute, the Legislature reserved to municipalities the right to regulate and control such activities of the State pursuant to 38 M.R.S.A. § 1497. This statute provides as follows:

> Nothing in this Act may be construed to exempt any ... facility for the disposal or storage of low-level radioactive waste ... from meeting any licensing, permit, certification, variance or other approval requirement of the State of Maine or political subdivisions thereof.

The appeal of Pittston's argument here is undermined by a close analysis of this statute. First, section 1497 does not confer or otherwise clarify any power of municipalities to regulate and/or prohibit statutorily mandated and authorized activities of State government. In fact, section 1497 simply indicates that "nothing in this Act" is intended to preempt the exercise of regulatory authority by the State or its political subdivisions. "This Act," as referred to in section 1497, is the "Act to Require Voter Approval of the Disposal of Low-Level Radioactive Waste" (hereinafter the "Voter Approval Act") 38 M.R.S.A. §§ 1491 et seq. The Voter Approval Act, which establishes the requirement that a low-level radioactive waste facility must be approved by the State's voters, is separate and distinct from the Authority Act. Compare 38 M.R.S.A. §§ 1491-1497 with §§ 1501-1542. The Voter Approval Act was enacted in 1985, two years before the 1987 Authority Act established the Authority as the State's instrument to carry out the federal mandate that the State must plan for a facility for low-level radioactive waste. In sum, section 1497 simply does not address the preemption issue raised here.

B. The Legal Applicability of the Edinburg and Garfield Plantation Ordinances to the Site Investigation Work of the Authority.

The foregoing analysis leads to the same conclusion with respect to the applicability to the Authority of Edinburg's and Garfield Plantation's outright prohibition on site investigation work. It is true that the language of these ordinances is different from that of Pittston, since Garfield Plantation and Edinburg directly prohibit "any testing or drilling" work rather than requiring a permitting procedure for all manner of site investigation. Nonetheless, the scope of the Authority's statutory mandate is both broad and specific, and that mandate must be seen as frustrated by the application of a municipal prohibition on the Authority's site investigation work. Accordingly, we believe the prohibitions on site investigation work in the Edinburg and Garfield Plantation Ordinances are preempted and do not apply to the Authority. 30-A M.R.S.A. § 3001(3); 38 M.R.S.A. §§ 1502, 1521(5) and 1521(13).

C. Municipal Prohibitions Directed at the Actual Siting or Construction of a Low-Level Radioactive Waste Facility.

The actual selection of a site, and the planning for possible construction and operation of a low-level radioactive waste facility, is a process that remains in its preliminary stages. There is the prospect that Maine will make use of a facility in another state, as is currently being negotiated. Further, it is wholly speculative whether any particular site in Maine might be selected and approved by the Authority for this purpose. Indeed, if the Authority does single out a site that it prefers, that selection, by State law, requires the approval of 60% of those voting in a special election in the affected municipality. 38 M.R.S.A. § 1527(3). The selection further requires the approval of the Maine Legislature. 38 M.R.S.A. § 1479. The selection further requires the approval of a majority of those voting in a state-wide election. 38 M.R.S.A. § 1493. The selection is further subject to permit review by the Maine Department of Environmental Protection as well as by the federal Nuclear Regulatory Commission.

Accordingly, it seems premature to offer abstract opinions regarding the applicability of the prohibitions in these particular town ordinances to the Authority's actual siting and construction of a facility. It is true that the general principles outlined above may well lead to the conclusion in a particular context, should one arise, that a municipal prohibition of this type is subject to preemption. Yet the law does afford the electorate in a municipality in which a site is ultimately selected an extraordinary veto power. Section 1527(3), as described above. While the electorate of the affected municipality has an opportunity under this statute to veto such a site, that action would occur in the context of the procedure set forth in section 1527 in the event that a site is selected by the Authority. The existence of a prohibitory ordinance of the type already enacted by the three municipalities may be strongly suggestive, but is not legally dispositive, of the outcome of the municipal election requirement under section 1527. In sum, if the Authority were to select a site in a municipality that has adopted a prohibition of this type, the special municipal election procedure set forth in section 1527 would still be implemented and would be legally determinative of whether municipal voter approval had been granted under the law.

**VI. EXECUTIVE SESSIONS**

As you know, the Department of Attorney General does not currently provide legal representation to the Authority. We therefore are not accustomed to the manner in which the Authority routinely handles its meetings and deliberations. However, our experience with this particular matter suggests a word of advice regarding the use of executive sessions.

The State's Freedom of Access Law is explicit that meetings of boards such as the Authority are to be public. 1 M.R.S.A. §§ 401-405. There are few exceptions to this general rule, and the general rule is by law to be construed liberally and its exceptions narrowly. Id. Guy Gannett Publishing Co. v. University of Maine, 555 A.2d 470 (Me. 1989). The exceptions enable a public board such as the Authority to discuss certain specified matters in executive session, out of the public eye, but policy decisions of the Authority are always to be made in public session, as generally are substantive deliberations of Authority members leading up to those decisions. Id. Marxsen v. MSAD No. 5, 591 A.2d 867 (Me. 1991).

In the current situation, the Authority held a regular meeting on May 26, 1992. The Authority went into a lengthy executive session to discuss certain issues with its counsel.[3/] When the Authority came out of its executive session, there were a series of motions made by Authority members dealing not only with the request for a legal opinion from the Attorney General, but also with the Authority's responses to petitions for rulemaking made by the Town of Pittston. These motions were voted on with essentially no debate or discussion at the public meeting.

The Authority may have been acting within the parameters of the Freedom of Access Law when it entered into an executive session to consult with its counsel on certain legal issues identified as within the bounds of section 405(6)(E). However, the manner and content of the Authority's ensuing public meeting strongly suggest that policy deliberations took place in executive session, particularly in formulating the Authority's responses to Pittston's petition for rulemaking, in excess of the limited bounds of an appropriate executive session under section 405.

To reemphasize, policy decisions of the Authority are to be made in public meeting. Policy deliberations leading up to such decisions are likewise to be held in public meeting. Legal consultation with counsel within the parameters set forth in section 405(6)(E) is permissible in executive session.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

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3/ The Freedom of Access Law provides that consultation may be conducted in executive session between the board and its attorney concerning the legal rights and duties of the agency, pending or contemplated litigation, settlement offers and matters (i) where the duties of the agency's counsel pursuant to the code of professional ethics clearly conflict with the public disclosure purposes of the statute or (ii) where premature general public knowledge would clearly place the agency at a substantial disadvantage. 1 M.R.S.A. § 405(6)(E).

cc: Hon. Charles Pray, President of the Senate
Hon. John Martin, Speaker of the House
Senator Dale McCormick
Senator Michael Pearson
Senator Margaret Ludwig
Representative Susan Farnsworth
Representative Clyde Hichborn
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