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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

May 1, 1984

The Honorable Polly Reeves
Maine House of Representatives
State House
Augusta, Maine 04333

Dear Representative Reeves:

By letter of April 2, 1984, you have requested the Opinion of this Department concerning the effect of certain legislation to be proposed by citizen initiative upon the power of the Legislature to address the same subject matter by legislation between the time the initiative legislation is proposed and the time it is submitted to the voters. The proposed initiated legislation, a draft of which is attached to your inquiry, would make subject to popular referendum any recommendation to the Legislature (1) of the Board of Environmental Protection, made pursuant to 38 M.R.S.A. § 1478, that a low-level radioactive waste disposal or storage facility be constructed in Maine, and (2) of the Governor, made pursuant to 38 M.R.S.A. § 1474, that the State enter into any compact or agreement with any other state or the federal government concerning the

disposal or storage of low-level radioactive waste.[1/]

Your inquiry assumes the presentation of suitable petitions to initiate such legislation under the Maine Constitution, Article IV, Part 3, Section 18 to the First Regular Session of the 112th Legislature, and voter approval of the initiated legislation at the general election to be held in November, 1985.

On the basis of these assumed facts, you inquire more specifically (1) whether the presentation to the 112th Legislature of an initiative requiring voter approval of low-level radioactive waste decisions would prevent that Legislature from approving either the establishment of a disposal facility in Maine, or entry into an interstate agreement on the subject, until after the voters have voted upon the initiated legislation; and (2) whether subsequent voter approval of the initiated legislation would apply to any such action of the Legislature taken during the First Regular Session of the 112th Legislature.

For the reasons which follow, it is the Opinion of this Department that the pendency of the initiated legislation would not prevent the First Regular Session of the 112th Legislature from approving a waste disposal facility in Maine, or approving an interstate agreement on the subject. With regard to your second question, the Department is able to conclude only that retrospective application of the initiated legislation could be unconstitutional if vested rights had arisen subsequent to the effective date of the action of the 112th Legislature but prior to the approval of the initiated legislation by the voters. Whether such rights will arise, however, is impossible to determine in advance.

[1/] The proposed initiated legislation expressly provides that these issues be presented to the voters at the next statewide election after a facility or compact is recommended. Although unspecified, it appears that the intention is to require voter approval in addition to legislative approval, and independent thereof, since no amendment is made to the statutes requiring legislative approval. If so, the proposal might be clarified, particularly to address the situation where the recommendation is rejected when first put to a vote, either by the people or in the Legislature.

I. Effect of Pending Initiated Legislation.

The presentation of petitions under Art. IV, pt. 3, § 18 of the Maine Constitution is merely an alternative means to initiate legislation. "The measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors. . . . If the measure initiated is enacted by the Legislature without change, it shall not go to a referendum vote. . . . " Me. Const. art. IV, pt. 3, § 18. The only effect of presentation of an initiative on the power of the Legislature to legislate is that legislation qualifying as an "amended form, [or] substitute" for the initiated legislation must be submitted to the voters together with the initiated legislation as a "competing measure," and cannot become law except by approval of the voters. Id.; Farris ex rel. Dorsky v. Goss, 143 Me. 227, 60 A.2d 908 (1948).[2/]

Thus, the more germane inquiry with respect to your first question is whether any action of the First Regular Session of the 112th Legislature, approving the establishment within the State of a low-level radioactive waste disposal or storage facility or approving an interstate compact, would constitute a "competing measure" to the initiated legislation, and thus not take effect unless approved by the voters.

In Farris, the Maine Supreme Judicial Court declared that, to determine whether a legislative action is a "competing measure" under the constitutional provision, the Court will not consider "how the Legislature may have regarded it . . . [but] only what it is in fact." The Court went on to describe a "competing measure" as a "bill which deals broadly with the same general subject matter [as the initiated measure], particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together. . . ." Farris, supra, at 232.

Applying this inconsistency test, it cannot be said that the initiated legislation attached to your inquiry would be inconsistent with a legislative enactment approving either a particular waste disposal or storage facility or a particular interstate compact dealing with that subject. There is no

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[2/] It should be noted that legislation qualifying as emergency legislation under Me. Const. art. IV, pt. 3, § 16 cannot constitute a "competing measure," by virtue of the provisions of that section and Section 17. McCaffrey v. Gartley, 377 A.2d 1367 (Me. 1977).

necessary conflict between legislative approval of a given waste facility or interstate compact and a subsequent amendment to the procedures by which further facilities or compacts are to be approved. The first action deals with a specific proposal, while the latter addresses generally the procedure for considering future proposals without regard to the merits or wisdom of any given facility or compact. Since there is no incompatibility between the two, the Legislature's approval of a particular facility or compact would not be a "competing measure" to the initiated legislation.

In reaching this conclusion, this Department was aware that the language in the Farris opinion quoted above to describe the test for a "competing measure" suggests the possibility that a legislative action that was not inconsistent with initiated legislation could still be considered a "competing measure." Such a construction was also considered possible by at least one Justice of the Law Court in a later case,[3/] who suggested that "it . . . appears manifest that the 'amended form, substitute or recommendation . . .' mandate of [Art. IV, Pt. 3] Section 18 . . . functions to save the electors effort and expense. It creates a shortcut device which avoids the need that the electors take the additional step of invoking the [Art. IV, Pt. 3, § 17] referendum to subject to the vote of the electors an enactment of the Legislature affecting the subject-matter of an initiated bill. The 'amended form, substitute or recommendation . . .' mandate incorporates directly into the initiative an equivalent of the [§ 17 "people's veto"] referendum, thereby achieving the same ultimate options for the electors as would result, if with greater effort and expense, the electors were to supplement the [§ 18] initiative with a resort to the [§ 17] referendum." 377 A.2d 1373-4 (emphasis added).

If this construction were adopted, the facts hypothesized in your inquiry might offer an example of a legislative measure which, while not inconsistent with the proposed initiative, might nonetheless be considered "competing." If, during the First Regular Session of the 112th Legislature, the Legislature receives a recommendation of the Board of Environmental Protection under 38 M.R.S.A. § 1478 or of the Governor under § 1474, and approves a bill accepting that recommendation, that action of the Legislature would normally become effective 90 days after the Legislature's adjournment. Me. Const. art. IV, pt. 3, § 16. Thus, the very actions sought to be made subject to voter approval through the initiated measure would become

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[3/] Justice Wernick, concurring in McCaffrey v. Gartley, 377 A.2d 1367, 1372 (Me. 1977).

legally effective prior to consideration by the voters of the initiated legislation. Such actions, while not strictly inconsistent with the initiated legislation as indicated above, clearly would deal with the same subject matter and therefore might be deemed to be "competing."

This Department concludes, however, that the clear language of Section 18 precludes the possible construction of the Constitution suggested by the Farris opinion and Justice Wernick. A requirement that legislative action must be inconsistent with the initiated legislation in order to be a "competing measure" would seem to follow directly from the language of Section 18. That section requires that "any amended form, substitute, or recommendation of the Legislature" be presented to the voters together with the initiated measure "in such manner that the people can choose between the competing measures or reject both." The referendum ballot must thus be structured to allow the voters to approve one or the other of the competing measures, or to reject both, but not to allow approval of both measures. Legislative approval of a recommended facility or compact would not establish the situation where the voters could logically only choose either to ratify the approval or amend the approval process, or reject both. Since it would not be illogical for both a particular facility or compact and the suggested procedural change to be approved, the two questions therefore cannot be presented to the voters as "competing measures," which, in the sense contemplated by the Constitution, must clearly be alternatives to one another.

II. Effect of the Approval of the Initiated Legislation on Prior Legislative Acts.

The foregoing analysis also provides the answer to your second inquiry. Since it has been concluded that legislative approval of a compact or waste facility would not be a "competing measure" to the initiated legislation, it would therefore take legal effect if the normal ninety day waiting period[4/] were to expire prior to voter approval of legislation amending the approval process. Such a legislative act would ordinarily not be subject to the later-enacted procedural amendment, unless the initiated legislation were

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4/ By virtue of Me. Const. art. IV, pt. 3, § 16, non-emergency legislation takes effect 90 days after the adjournment of the session of the Legislature in which it was passed, unless, of course, the legislation itself provides for a later effective date.

given retrospective application. The draft legislation attached to your opinion request contains a provision clearly intended to make it apply to previously approved compacts or agreements. Proposed 35 M.R.S.A. § 3397. It contains no such provision with respect to previously approved waste storage or disposal facilities. The question thus becomes whether retrospective application of the initiated legislation to prior legislative approval of a compact or agreement would be constitutional.

Laws enacted through the initiative process are subject to the same constitutional restrictions on retrospective laws as are those adopted by the Legislature. Generally a statute may be constitutionally applied retrospectively unless its effect is to impair vested rights. Proprietors of the Kennebec Purchase v. Laboree, 2 Me. (2 Greenl.) 275, 295 (1823). The proposed initiated legislation could not constitutionally be applied to a recommendation previously approved by the Legislature if to do so would impair or divest others of rights upon which they had justifiably relied. In this case, were the Legislature to approve entry into an interstate compact or agreement, it is apparent that rights could vest in third parties upon the effective date of the legislative action and before the submission of the initiative to the voters. However, until such legislative action actually occurs it is not possible to reach any conclusion as to whether such vested rights will in fact arise. Thus, the most this Department can say now is that it is possible that the retrospective application of the initiated legislation would be unconstitutional.

Consequently, it would appear that the only certain constitutional means for the voters at large to obtain a popular referendum to approve or disapprove an action by the Legislature at the First Regular Session of the 112th Legislature approving a waste facility or entering into an interstate compact would be by the referendum procedure set forth in Article IV, Pt. 3, § 17 of the Maine Constitution.[5/] Such a "people's veto" referendum would be separate and distinct from the initiated legislation attached to your inquiry.

[5/] In approving a waste facility or interstate compact, the Legislature could, of course, make that action subject to referendum unconditionally, by so providing in the bill, Me. Const. art. IV, pt. 3, § 19, or conditionally, if the initiated legislation is approved, by delaying the effective date of their approval of the compact beyond the date of the next statewide election.

If this Office may be of further assistance, please do not hesitate to contact me.

Sincerely,

JAMES E. TIERNEY
Attorney General

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