

June 8, 2011

Attorney General William Schneider
Office of the Attorney General
6 State House Station
Augusta, ME 04333

Re.: L.D. 1567

Dear Attorney General Schneider:

We write to you in reference to L.D. 1567, "Resolve, To Authorize the State To Purchase a Landfill in the Town of East Millinocket" and our understanding that, as currently configured, L.D. 1567 does not comply with state Constitutional requirements. *See Me. Const. art. IX, § 14.* Despite the Legislature's laudable goal of restoring jobs in East Millinocket associated with the operation of the Katahdin Paper pulp and paper mill (Katahdin paper mill), that goal cannot be achieved unless it is consistent with the Constitution.

Pursuant to the text of L.D. 1567, the State Planning Office is directed to "acquire, own and cause to be operated" the Dolby Landfill in East Millinocket from Brookfield Asset Management, parent company of Katahdin Paper Company, LLC (Brookfield). The State's prospective acquisition of the Dolby Landfill for a nominal purchase price includes, among other things, "unused solid waste capacity, expansion potential and the rights and obligations of all related solid waste licenses, together with such related property, if any."

Our current understanding of the situation is that the Dolby Landfill contains over thirty years worth of waste that has been discharged at that site since the 1970s by what is currently the Katahdin paper mill in association with the mill's production of pulp and paper. For more than twenty years, a permit renewal application for that landfill has been pending at the Department of Environmental Protection but has not been acted on due to continuing problems with leachate discharges and landfill stability issues. For at least two decades there have been documented and unpermitted discharges of leachate from the landfill to the groundwater and surface waters in the region. Additionally, we understand that the soil underlying the landfill may be contaminated. In short, the State is actively pursuing acquisition of a landfill that is in violation of state and federal laws.

As the new owner of the landfill, the State will assume primary responsibility and liability for past violations and for ensuring that future operations are in compliance with state and federal laws. In addition to the liability and any associated costs for unlawful discharges and soil contamination, the State will also acquire what has been represented as a \$250,000 annual expense of operating and maintaining the landfill. Finally, the State will also assume liability and responsibility for closing the landfill. Maine DEP currently estimates that the closure costs for the landfill, including post-closure operation and maintenance costs, are approximately \$17 million (up from a 2009 estimate of \$12-\$13 million).

Thus, ownership of the Dolby Landfill will entail annual operation and maintenance costs of at least \$250,000/year, liability for any past, current, and future violations of federal and state law, and at least \$17 million in cleanup and closure costs. The legislation directing SPO to acquire these liabilities provides no details as to how the costs of those liabilities will be met by this or future Legislatures.

To that end, article IX, section 14 of the Maine Constitution prohibits the Legislature from creating:

any debt or debts, liability or liabilities, on behalf of the State, which shall singly, or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed \$2,000,000 . . . and excepting also¹ that whenever 2/3 of both Houses shall deem it necessary, by proper enactment ratified by a majority of the electors voting thereon at a general or special election, the Legislature may authorize the issuance of bonds on behalf of the State at such times and in such amounts and for such purposes as approved by such action

Landfill owners are legally obligated to fund the costs needed to close the landfill and cleanup contamination associated with landfill operations. Such legal obligations create liability on behalf of the State, as the new owner, in the amount of those costs noted above. L.D. 1567 does not contain any provision accounting for payment of the liability or debt it creates. Accordingly, one can only conclude that the money needed to operate, maintain, and close the landfill and cleanup any contamination will ultimately come from general appropriations, as opposed to a special fund. *Compare* Opinion of the Justices, 146 Me. 183, 79 A.2d 753 (1951) *with* Edgerly v. Honeywell Info. Sys., 377 A.2d 104 (Me. 1977). Even if Brookfield turns over the \$7 million it purportedly has on reserve to fund closure of the Dolby Landfill to the State, that amount falls \$10 million short of DEP's current estimated closure costs. And, therefore, the debt or liability created by L.D. 1567 remains at a minimum \$8 million in excess of the Constitutional threshold. Although there is potential for the State to realize some income due to (limited) unused capacity and the potential to expand the Dolby Landfill (and we understand that expansion would be especially costly due to the instability of the Dolby Landfill), there is

¹ The other exceptions provided for in article IX, section 14 of the Constitution are not relevant here.

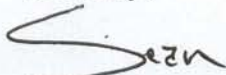
absolutely no information available which suggests that any potential revenue generated from ownership would reduce the debt and liability that L.D. 1567 creates to less than \$2 million.

Accordingly, through L.D. 1567 the 125th Legislature would create a debt or liability well in excess of \$2 million on behalf of the State, leaving the funding of that liability to future Legislatures. Yet “[o]ne Legislature cannot impose a legal obligation to appropriate money upon succeeding Legislatures” absent strict adherence to the procedural requirements imposed by article IX, section 14 of the Maine Constitution. Opinion of the Justices, 146 Me. at 190, 79 A.2d at 756. L.D. 1567 is a perfect example of the type of legislative action that triggers the requirements of article IX, section 14—a policy decision that carries substantial financial burdens that will be primarily borne at some future date.

Pursuant to article IX, section 14, L.D. 1567 must be amended to provide for the bond issuance needed to fund the liability L.D. 1567 creates. Until it is so amended and unless two-thirds of both the House and the Senate and a majority of the voting electorate approve that bond issuance, L.D. 1567 cannot pass Constitutional muster regardless of its policy goal. To that end, we believe it critical that your office review this legislation and determine whether it meets the requirements of Maine’s most fundamental law, our Constitution.

Thank you for your consideration of these comments.

Sincerely,



Sean Mahoney
Vice President and Director
CLF Maine

cc: Sen. Saviello
Rep. Hamper
Sen. Goodall
Rep. Duchesne
AAG Laubenstein
AAG Reid
Deputy Commissioner Aho
John Butera