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March 12, 2019

Senator James Dill, Chair
Representative Craig Hickman, Chair
Committee on Agriculture, Conservation and Forestry
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333-0100

Dear Senator Dill and Representative Hickman,

LD 723 raises constitutional questions under Article I, Section 21 of the Maine Constitution because LD 723 would declare public certain privately-owned lands without compensating the affected private landowners.

Article I, Section 21 of the Maine Constitution states "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." LD 723 would declare public those lands beneath the current mean low water mark of tidal waters that were impounded prior to January 1, 1997. Those lands would be characterized as state-owned submerged lands, which are held in trust for the public and available to private entities for lease.

Impoundments do not change property boundaries. If privately owned land is flowed by an impoundment, that land is still privately owned unless the fee owners conveyed it to a public entity or a public entity condemned that property. *See Lowell v. Robinson*, 16 Me. 357, 361 (1839). Assuming that LD 723 is for a public use and in response to a public exigency, LD 723 does not provide any mechanism for compensating the owners of the private property that would be taken by the State pursuant to LD 723. Absent a compensation mechanism and a funding source, LD 723 may well violate Article I, Section 21 of the Maine Constitution.

A proposed draft amendment to LD 723 would limit the applicability of LD 723 to the land beneath waters that are impounded by structures other than structures licensed or regulated by the Federal Energy Regulatory Commission. Such an amendment would reduce the acreage of private land being taken by the State, and thus the amount of a fiscal note, but it would not, in all likelihood, resolve LD 723's constitutional problems.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lauren E. Parker'.

Lauren E. Parker
Assistant Attorney General