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LEGAL ASPECTS OF PROVIDING AND CONTROLLING ACCESS TO NEW HAMPSHIRE'S COASTAL RESOURCES

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by

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FOREWORD AND ACKNOWLEDGMENTS

This study was prepared under a grant from the Sea Grant program administered by the University of New Hampshire Marine Program. As must be expected in an undertaking such as this, what we found was not always what we expected, and the initial proposal was in some aspects too broad for a relatively modest project.

Where we have not been able to develop firm proposals, we have tried to point the direction and provide a framework for further research and the creation of mechanisms to resolve conflicts over access and preservation of resources.

In each major chapter we have acknowledged those who worked with us, taking their time to discuss the issues with us and to review our drafts and comment on them. Wherever possible we have sought to reflect those comments in our final revisions. However, there are a few people who should have special recognition for their ongoing support and advice on all phases of the project. These include Brian Doyle, Associate Sea Grant Director at the UNH Marine Program; George Smith, Director of the New Hampshire Port Authority, Chris Simmers, Marcia Keller and Mark Chittum of the Coastal Zone Management program in the Office of State Planning, and Francesca Latawiec of the Strafford Regional Planning Commission.

Several people responded to our initial inquiries about coastal access and provided useful background information. These included Louise H. Tallman of the Rye Conservation Commission, Peter Gamester of the New Castle Board of Selectmen, Rance G. Collins of the Greenland Planning Board, George N. Olson, Executive Director of the Rockingham Planning Commission, John F. Rowe of the Newington Planning Board.

Diane White of the Rockingham Regional Commission prepared the diagram maps for Seabrook/Hampton Harbor and Portsmouth Harbor. Alice Chamberlin, Esq., Director of the Environmental Law Clinic and Franklin Pierce Law Center, provided advice and counsel. Bonnie Morrison of the Franklin Pierce Law Center helped to put drafts on the word processor.

We are grateful to all who contributed to our understanding of coastal access issues and we hope that this report will be a positive contribution.

Carolyn Baldwin,
Project Investigator

Kristin Johnson
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SUMMARY AND CONCLUSIONS

Introduction

The purpose of this project was to identify conflicts between public access to and protection of coastal resources in New Hampshire, and to consider legal mechanisms for resolving them. We chose three different types of resource for study, each having its own set of access priorities and concerns for resource conservation.

The areas chosen were (1) Portsmouth Harbor, New Hampshire's only commercial shipping port; (2) Seabrook/Hampton Harbor, a small fishing and recreation facility; and (3) the tidal estuarine/riverine system comprising the Great and Little Bays and their tributary rivers.

In each case we interviewed people concerned about the area in question from development, business, recreational, residential and governmental points of view. We compiled their responses and made site visits to develop a composite description of the area and the issues and conflicts identified. Finally we considered possible mechanisms to resolve the identified issues and conflicts.

Portsmouth Harbor

Portsmouth Harbor, as the only ice-free deep water harbor between Boston and Portland, Maine, is potentially, at least an important element in the economic development of the state.

The State Port Authority pier ships scrap metal and accepts and ships other cargo. Until recently a coastal container ship called weekly at the pier. Current proposals for upgrading access and adding a second pier may revive this service for the state's industry. The New Hampshire Port Authority, under its current director Mr. George Smith, has aggressively sought to expand the role of Portsmouth as a chipping port. Business people, through the Chamber of Commerce Port Committee and the Propeller Club, actively promote business and work together to deal with potential conflicts.

The Portsmouth Naval Shipyard, a federal installation currently engaged in rehabilitating nuclear submarines, is a major employer in the area and an important member of the harbor community although it is actually located in Kittery, Maine, on the north side of the harbor.

The City of Portsmouth has in recent years become increasingly attractive both to visitors and to potential residents. Its various businesses catering to tourists and shippers as well as commercial and industrial users.

Interests identified include residential and tourist accommodation and related business, commercial fishing, recreational boating, industrial and commercial shipping, federal, state and local governments, and wild-life habitat and water quality protection.

Issues identified among these interests were, in the government sector: (1) the Port Authority mandate is over-broad, detracting from its main mission of port development and

management; (2) lack of coordination among state agencies responsible for regulating activities in the harbor area, and confusing and conflicting directives and requirements; (3) lack of consistent state commitment to port development; (4) poor enforcement of state regulations and permit conditions; (5) some concern for security at the Naval Shipyard, especially from fishermen and other small boats in the harbor.

In the business and industry sector issues focus especially on the tourist recreational interests and commercial shipping. Road salt brought in through Portsmouth for the entire state is stored on a pier in the harbor and scrap metal is held for shipment at the state pier. These shipping-related activities raise predominantly aesthetic problems for the tourist and residential business interests.

Environmental concerns focus on industrial spills and discharges from both industry and upstream municipal sewage systems, dredge and fill in channels and adjacent wetlands. Spill cleanup is especially difficult because of the swift currents. An oil spill can destroy an entire crop of oysters in the Great Bay aquaculture project and, if it occurs coincidentally with release of young fish, will adversely affect sea ranching and sport fish stocking projects.

Seabrook/Hampton Harbor

Seabrook/Hampton Harbor is a tidal basin enclosed behind barrier beaches--Hampton Beach and Seabrook Beach, both of which are extensively developed. The harbor and its tributary rivers

with extensive tidal marsh and flats, are fertile spawning grounds for fish and other wildlife. Siltation from the rivers along with sand deposited by long-shore currents and aggravated by jetties, constantly threatens the existence of the harbor. A regular dredge program is essential if the harbor is to remain a viable port for commercial and recreational fishing and boating. Natural and man-made impacts combine to create conditions which will, if not consistently addressed, render the harbor unusable in the not too distant future.

Major man-made impacts include the jetties mentioned above, commercial and residential development on the barrier beaches, dunes and wetlands, roads and bridges, and the Seabrook Station, a nuclear plant under construction by Public Service Company of New Hampshire. (At the time of this writing construction was halted for financial reasons). State and private facilities exist side-by-side in the harbor, including fish piers, launching ramps, marina and boat yard facilities and piers for "party boats." A substantial area around the nuclear plant, a radius of 1.25 miles, is reserved as an "area of control" under Nuclear Regulatory Commission regulations. Much of this area is marshland and is thus protected from further encroachment by development and fill operations. The back-dunes area of Seabrook Beach is of special concern as the only remaining undeveloped dunes in the area. Efforts are being made to preserve them through acquisition by the town or a private conservation organization.

Except for the Seabrook Station, major interests revolve

around the tourist and recreational and commercial fishing industries, and summer is the important season in the economic life of the communities of Hampton and Seabrook. The state has strong interests, not always coordinated, in both the environmental integrity and economic vitality of the area. The state runs a commercial fish pier and owns Hampton Beach (as it does most of New Hampshire's ocean beach frontage). It issues commercial and recreational fishing licences and collects fees for activities on the water and state-owned land.

Areas of conflict focus on tourist/non-tourist activities and extend to both government and private entities. Local governments and business feel that the state takes unreasonably large revenues from the area and does not return a fair share, especially for harbor maintenance projects. Private business considers the state, with its commercial fish pier and control over mooring space, as a competitor and fears an increase in state-run enterprise will damage private business.

The location of a major power facility on New Hampshire's limited coastline and in a major tourist-recreational area presents a major source of conflict, although the very existence of the plant requires preservation of some natural resources in the protected radius. The project has closed off a launch ramp in Seabrook which may not be reopened. While it has contributed a major portion of tax revenue to Seabrook, the Public Service Company plant contributes none to Hampton. Hampton feels that the potential impact of the plant, once it begins production, may adversely affect its tourist industry. Evacuation issues

are unresolved. (The impact if neither reactor at the Seabrook Station is completed has not been evaluated and such considerations are well beyond the scope of this study.) The very existence of the Seabrook plant has attracted people to the area to visit Public Service Company's elaborate education center. Many of these visitors are school children, but what proportion are tourists who bring additional business to the area is not known.

Clamming, fishing and maintenance of a healthy ecosystem compete with development pressures, especially in the Seabrook dunes and the wetlands bordering developed areas.

Enforcement of state law regarding dredge and fill and lack of coordination among state agencies are problems here as elsewhere. Administrative reorganization should consider means to resolve conflicting mandates among state agencies and provide for a common enforcement mechanism for state regulations and permit conditions. This will require a well-understood management policy at the state level, but development of such a policy must involve extensive local input if it is to be successful.

Local governments also need both the tools and the will to enforce their ordinances and regulations. Existing enforcement mechanisms are cumbersome, expensive and thus often ineffective. Some property acquisition will be necessary to preserve the remaining dunes at Seabrook. This can be accomplished entirely with local funds or possibly with some federal help from the Land and Water Conservation Fund.

The Public Service Company Barge facility and the closing of a launch ramp continue to be issues for the Town of Seabrook.

Riverine and estuarine coastal resources

Rather than focus on a specific area for this type of coastal resource, the study generalized the description. It is based especially on the work of the Strafford Planning Commission in organizing River Area planning projects in the Lamprey and Cocheco-Isinglass river basins, and the Great Bay Estuarine Sanctuary nomination prepared by the Office of State Planning, and the Great Bay Estuarine System Conservation Trust project, also spearheaded by Office of State Planning although it is a private land trust operation.

There is much privately owned land, some of it still in relatively large tracts, along the tidal shoreline. Major governmental installations include Pease Air Force Base on Great Bay in Newington and the University of New Hampshire's research facility on Adams Point, also on Great Bay.

Municipalities own some shoreline, sometimes used for boat launch ramps but also for non water-related purposes such as maintenance facilities and parking. The Audubon Society has a sanctuary on Little Bay and most of the remaining tidal shoreline is privately owned.

As cleanup of industrial discharges and municipal sewage disposal in the waterways progresses, there is renewed interest in waterfront property, both for private residential purposes and public recreation. It is in this area that conflicts arise

between public and private uses and among different recreational interests.

Major conflicts arise among (1) private landowners and recreational interests including picnickers, hikers and swimmers who are not always considerate of one another or the property owners' rights. Problems include littering, improper parking and use of motor vehicles, noise and trespassing; (2) different recreational interests including hunters and fisherman, who are concerned for habitat maintenance, and developers, motor boats and off-road vehicles, non-power boaters (especially canoes) and swimmers and power boats.

Enforcement of state laws and regulations on dredge and fill and pollution is a problem here as elsewhere. In addition, the state's policing of its rules on boating is spotty at best. Lack of cooperation between municipalities and the state, along with uncoordinated and inconsistent state policy, threatens shrinking wildlife habitat and continuing pollution problems.

LEGAL MEMORANDA

Two legal memoranda are included in this report, both of major concern to the riverine/estuarine areas.

Municipal Liability on the Waterfront

The question of potential liability is often raised by municipal officials when it is suggested that a town undertake to maintain an access point for waterfront activities. The recent case of State v. Brosseau 123 N.H. (1983) raises the

question whether the state also may incur liability for its facilities. Our research indicates that the exposure is not as great as feared and that insurance against such liability will not greatly increase the municipal insurance bill. More realistic concerns are problems of cost of maintenance and policing and preventing overly-intensive and inappropriate use of such facilities.

Private landowners who permit use of their land for recreational purposes are shielded from liability by statute. But the concept of sovereign immunity for municipalities has been abolished in New Hampshire, first by court decision and then by statute.

Ownership of Inter-Tidal Lands

No New Hampshire statute has clarified the issue of state vs. private ownership of land between mean high and mean low water. A seventeenth century Massachusetts ordinance provided for private ownership of these intertidal lands although the public was permitted to cross them for limited purposes. Because New Hampshire was for a brief time part of Massachusetts, the ordinance may arguably be incorporated in New Hampshire law. Common law or statute in most states provides for state ownership to mean high water. Statute so provides in New Hampshire for non-tidal waters (See RSA 488-A). Conflicting nineteenth century court decisions in New Hampshire leave the question unresolved. The issue has not been addressed judicially in recent years, first because the state owns most of the ocean beaches so the question is in many cases irrelevant,

and secondly because there has not until recently been substantial development pressure on the intertidal lands. Finally, of course, state law restricts activities in tidal wetlands (RSA 483-A). The issue can, however, be expected to arise again as population and development pressures increase.

SUMMARY OF RECOMMENDATIONS

General:

1. Consistent policy and efficient permitting process.

State agencies need to coordinate their policies and permitting procedures. The current reorganization effort should be accomplished with that consideration in mind, but reorganization alone cannot resolve the problems. Most people we interviewed were not hostile to reasonable regulation in the interest of environmental protection, safety and public welfare. But many expressed frustration at inconsistent or conflicting requirements, delays and unclear policy objectives.

2. Consistent and efficient enforcement: state level.

Also frustrating to conscientious developers and industry as well as to sportsmen and others concerned with habitat preservation and environmental conservation was lack of enforcement. At both state and federal levels, enforcement resources have been cut back and personnel from various agencies do not have cooperative responsibility. Again reorganization can help if this object is considered in the process. But a major policy declaration at the state administrative level will be necessary to make the best use of existing personnel.

Clear legislative and administrative policy that laws and regulations be enforced consistently and fairly should be promulgated at the state level. Adequate funding will be required to carry out the policy and give it credibility. Costs of enforcement should be imposed on violators by statute. A carefully drafted citizens suit provision may provide for a broader enforcement reach.

3. Consistent and efficient enforcement: municipal level.

Towns do not presently have credible enforcement authority. Fines for violations of local ordinance are inadequate to encourage voluntary compliance (\$500 maximum following conviction for a zoning violation, \$1000 maximum for other police-power ordinances) and costs of enforcement are usually borne by the taxpayers.

4. Enforcement: state-municipal coordination

Local agencies, especially health officers, building officials, planning boards, conservation commissions, selectmen and police departments can serve to alert state enforcement agencies to violations of state permit requirements. But they must be informed when permits are issued and the conditions attached. They must also feel reasonable confidence that when a violation is reported prompt and effective action will be taken by the appropriate state agency. State policy and decisions on activities where the state either owns or has jurisdiction over waterfront property should consider local planning, zoning and health regulations.

5. Control of development.

Municipalities should design their master plans and zoning regulations to take into account the special character of waterfront property. Shoreland zones can evaluate development proposals in light of their water-dependent or water-related characteristics, and can protect sensitive ecological areas by wetlands overlay ordinances, shoreline setbacks, and cluster provisions which encourage preservation of wetlands and shorefront and/or provide for reasonable public access.

6. Liability.

Municipalities and private non-profit organizations which maintain access for the public to coastal resources should be relieved of excessive anxiety about potential liability through legislation designed to protect them except in extreme cases, even if a reasonable use charge is made to users. Thus reasonable maintenance of public access can be encouraged.

7. Land trusts.

The land trust concept should be expanded and developed to provide for preservation and controlled public access where appropriate. A land trust can hold property in fee or it can hold partial interests in the form of conservation easements. The trust should also consider partial development of some lands in order to fund preservation of sensitive areas. It should also be able to charge reasonable fees for access to cover policing and maintenance.

RECOMMENDATIONS FOR FURTHER STUDY

Several issues were raised in the course of this project which invite further study. They include

(1) Mooring allocation system: identification of alternative systems and development of a reasonable, consistent policy for allocating limited mooring space especially for pleasure craft. The issues revolve around whether a mooring can be sold or otherwise conveyed with a boat, whether a mooring holder can rent his mooring, and whether a mooring holder can replace his existing boat at the same mooring.

(2) Alternatives to open storage of salt and scrap piles. There is no doubt that both of these operations in Portsmouth harbor are legitimate and important commercial operations for an active seaport. Thus far no reasonable alternative has been found to the storage of these commodities on piers in the harbor.

(3) Potential impacts, economic and environmental, of non-completion of the Seabrook nuclear plant.

(4) Self-enforcing mechanisms for state and local laws and regulations. The consequences of ignoring state and local regulations must be sufficiently painful to encourage would-be violators to abide by the laws. Criminal penalties are usually inappropriate, and fines are difficult to collect. A citizen-suit provision might in some cases reinforce the state and municipality's ability to follow through on enforcement action.

LEGAL ASPECTS OF PROVIDING AND CONTROLLING
ACCESS TO NEW HAMPSHIRE'S COASTAL RESOURCES

Franklin Pierce Law Center, Concord, New Hampshire

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INTRODUCTION

In New Hampshire, with its short coastline and population and commercial pressures in the coastal area, competition for access to coastal resources is sometimes intense. The estuarine system known as the Great and Little Bays, coastal rivers, as well as the seacoast and island, must be carefully managed to foster both the development of compatible multiple uses and protection of these same resources from over use or abuse.

The matter of public access to coastal amenities is two-pronged. First, there is concern to facilitate public access to beaches, tidal areas, rivers and estuarine resources for legitimate purposes ranging from sport and commercial fishing, aquaculture and boating to more passive activities such as swimming and bird watching. On the other hand, it is vital that sensitive coastal, estuarine and riverine areas be protected from over-use to prevent loss of the very resources which attract both the public and private investment. Where access is be provided over or adjacent to privately held property, there arise conflicts between public and

private rights and priorities.

The project has focused on legal means to provide access to New Hampshire's estuarine, riverine and coastal resources, with emphasis on opportunities for compatible multiple use, while also addressing legitimate concerns for conservation of those resources and protection from improper or overly intensive use.

The purpose, then, of this project has been to explore different types of resources to determine what types of access exist, what uses are now made of New Hampshire's coastal resources, and what kinds of legal mechanisms exist or are needed to foster compatible multiple use in the best interests of the state and its people.

The report includes the following documents. (1) Report on Portsmouth Harbor. (2) Report on Seabrook/Hampton Harbor. (3) Report on estuarine and tidal-riverine access issues. (4) Memorandum on the extent of state authority over inter-tidal lands. (5) Memorandum on municipal, private and organizational liability at access points. Each report includes conclusions and recommendations, and conclusions and recommendations are summarized in the executive summary.

PROCEDURE

The first phase of the project was a review of Sea Grant projects and literature from other states looking for similar projects in other jurisdictions for both substantive and procedural guidance. Sea Grant and other organizations were contacted to follow up promising leads.

After discussion with Sea Grant personnel and a survey of the coastal area, three types of resources were chosen for intensive study. In each area key individuals were interviewed to obtain different views of the resources and use of them, and on-site visits were made. Where legal questions were raised, research was conducted on existing law in New Hampshire and comparisons made with law in other states.

Information from interviews, on-site visits and available written material were compiled and analyzed, and descriptive summary, conclusions and recommendations drafted.

POINTS CHOSEN

Three quite different types of coastal areas were chosen for intensive study. Because most of New Hampshire's beaches are in fact state owned, access to ocean beaches was not selected as one of the problems to be explored in detail. In New Hampshire beach access problems are largely physical, limited by road access, parking limitations and the like, rather than legal. Where legal problems do exist, they are highly local and individual, usually issues relating to the legal existence and extent of public rights of way.

Portsmouth Harbor, as the state's only seaport capable of handling commercial shipping, the mouth of a major estuarine system, and the site of a historic city and major commercial and industrial region, was an obvious choice.

A second type of resource was the smaller harbor, and we

selected Seabrook/Hampton harbor for closer study. The smaller harbors accommodate commercial and recreational fishing, recreational boating and shoreline activities such as clamming, hunting and birdwatching. They are basic to the state's important vacation/tourist industry as well as to commercial fisheries.

To help our readers visualize the harbors and the different interests using them, we have included sketch maps, prepared for the project by Diane White of the Rockingham Planning Commission.

Finally, we focussed on tidal estuarine and riverine areas. The Strafford Regional Council is at the same time working on a grant to study means of public access to riverine and estuarine resources. We have worked closely with Francesca Latawiec, community/regional planner at the Strafford Regional Council, to identify areas of concern and deal with legal issues while leaving it to the groups forming around the Lamprey and Cochecho river basins to identify specific problems. The interests and conflicts identified in this type of coastal resource are more easily generalized than are those in the harbors, so we have not described any estuarine or tidal river area in detail.

The situation is constantly in flux. Recent announcement that the container service will no longer serve Portsmouth affects the port in ways we have not analyzed. Public Service Company's financial problems remain unresolved and there is no way to forecast its effect on the coastal resources. The nomination of portions of the Great Bay to be a National Estuarine Sanctuary, if accepted, will certainly affect the inland tidal area. Even if it is not so designated, the studies and educational efforts, and the development

of the Great Bay Estuary Land Trust will have long-term ramifications for the region.

New Hampshire has a precious resource in its limited coastal regions. That it is being viewed from a broad planning perspective is a promising omen for wise use in the future.

PORTSMOUTH HARBOR

Introduction

As a mechanism for analyzing the various activities in and around the harbor, we have drawn upon a technique developed by Mark Hershman to differentiate between uses.¹ Hershman analyzes uses according to whether they are water dependent, water enhanced, or water neutral. "Water dependent" uses are those which would not exist without access to the water. These include fishing, shipping, tourist cruise boats, marinas and the like. "Water enhanced" activities are those which could be carried on at locations away from the waterfront, but which are enhanced in some way by a waterfront location. These may include restaurants, especially those in buildings providing a view of the harbor, tourist accommodations, and even residential development. The third category is those uses which are neither dependent on nor enhanced by a location adjacent to the waterway, and which could be carried on with equal success in a location away from the harbor. These include most industrial and commercial uses. Clearly the water dependent activities, so long as they are economically viable, must take precedence over those which could be successfully pursued without water access where priorities for waterfront locations must be established. However, we do not mean to imply that water enhanced activities should be excluded from the waterfront. The economic and aesthetic benefits to the region of compatible mixed use of its resources must be recognized and encouraged.

In preparing this report we received cooperation from many of those whose business interests revolve around the harbor area. Limitations of time and resources prevented us from interviewing everyone whose name was suggested to us. We tried to select a representative sampling of the various interests in order to get as many points of view as possible. We are most grateful to the following individuals who gave generously of their time to discuss with us their perspective on the harbor and its many users' interests.

George Smith, New Hampshire Port Authority

Kenard Lang, manager of the State Fish Pier on Pierces Island

Ted Spurr and John Nelson, New Hampshire Fish and Game Department.

Lt. Cdr. Timothy M. Boudewyns, legal officer for the Portsmouth Naval Shipyard and

Robert Johnston, public relations officer for the Portsmouth Naval Shipyard.

Calvin Canney, city manager and Chris Sheridan, director of development for the City of Portsmouth.

Joe Sawtelle, real estate developer on Nobles Island and elsewhere in the Portsmouth area.

Dick Holt, Portsmouth Navigation Division, Central Wharf Towboat Company.

Robert Whitaker, owner and operator of the Viking Cruise boats.

Phil Cava, chairman of the port committee, Portsmouth Chamber of Commerce.

Pat Genestreti, Simplex Wire & Cable Company.

Ruth Kotsonis, Dorchester SEA-3 company and chair of the Propeller Club safety and harbor improvements committee.

Kevin Tacy of York Harbor Export Inc.

Prof. Philip Sawyer of Sea Run, Inc. and the University of New Hampshire.

Description of the Resource.

Portsmouth Harbor, the only major harbor to which New Hampshire has direct access, is "the only ice-free deep water harbor between Boston, Massachusetts and Portland, Maine. The Piscataqua River channel is approximately 35 feet deep, thereby providing sufficient draft to accommodate most of today's largest ocean-going vessels."² The New Hampshire side of the Piscataqua River, which empties into the Harbor, gives access to water deep enough for ocean going shipping, while the Maine side is shallow. This fact accounts, at least in part, for the comparative intensity of development on the New Hampshire side. Tidal currents, bridges and the narrow and busy channel make navigation in and out of the harbor a matter for skilled pilots. In the case of large ships, those longer than 50 feet and especially oil tankers, tugs are required.

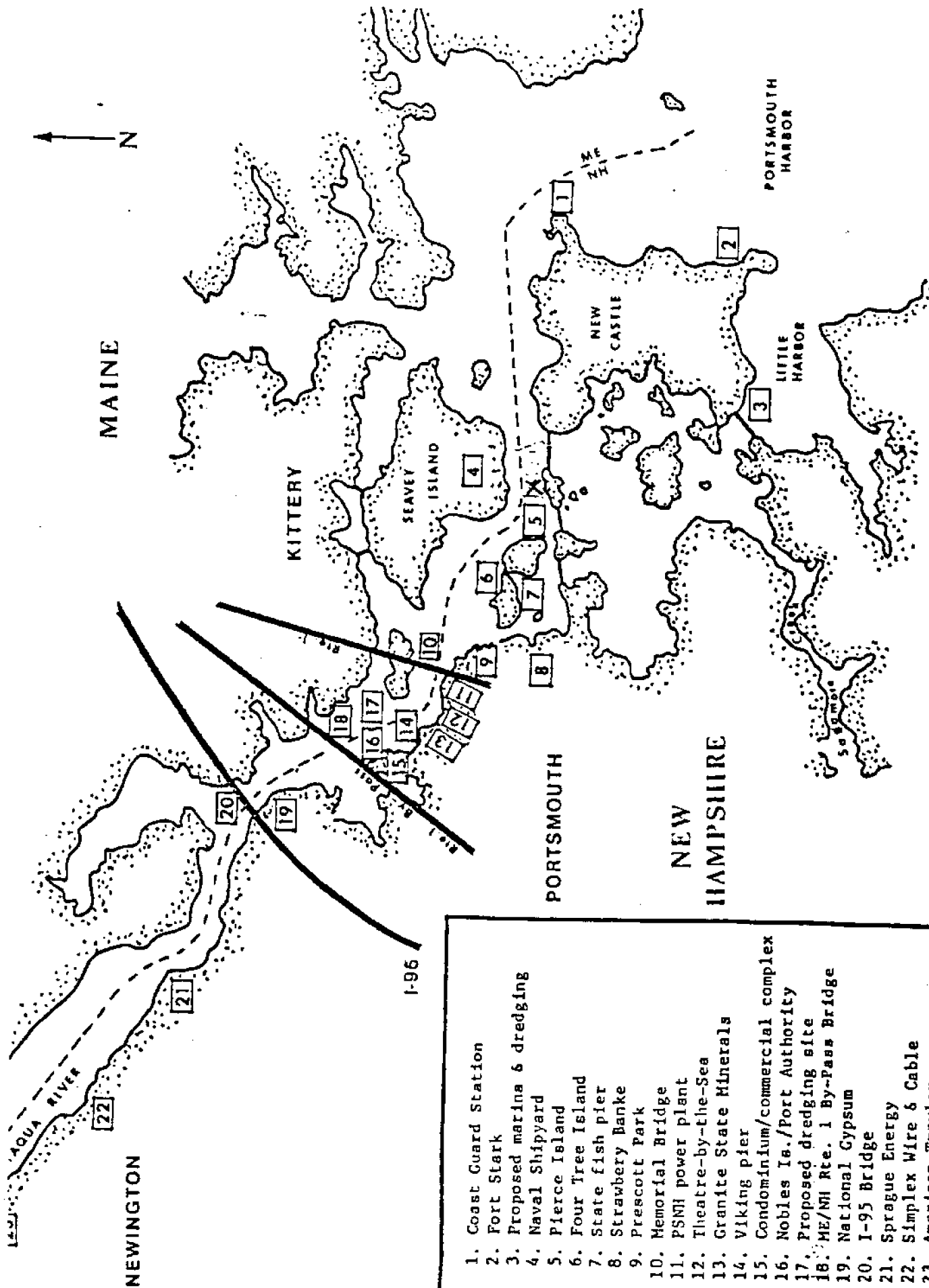
The northeastern side of the harbor and the river are bordered by the State of Maine, specifically the towns of Kittery and Eliot in the harbor area. The Town of Newcastle,

New Hampshire, abuts much of the outer harbor east of Portsmouth. It is an island connected to the mainland by bridges and causeways, and is largely residential in character. Part of the town's coastline is occupied by Fort Stark, a military installation no longer active. The function of this area now being discussed and its location does not directly affect the harbor area under study.

The City of Portsmouth itself is one of the oldest sea ports in North America. In recent years its citizens have taken a renewed interest in the city's history, as well as in its potential for commercial and industrial activity. Buildings along its narrow, winding streets, typical of old seaport communities, have been refurbished for a myriad of uses, many of them connected with the tourist industry now an important factor in the region's economic health.³

Pierce Island and Four-Tree Island are city owned and managed as public parkland. Public park continues west along the shoreline to the Memorial Bridge (a lift bridge) except for the state commercial fish pier at the western end of Pierce Island. The legislature in 1983 appropriated \$150,000 for a fish handling facility at the state fish pier, provided that the facility is leased to provide for amortization of a 20 year bond issue. (Chapter 423 VI E, Laws of 1983).

Prescott Park, on the mainland, is quasi-public managed under an endowment by a board of trustees. It has a small docking facility for private boats. A project is underway to develop it to accommodate more transient private yachts.



1. Coast Guard Station
2. Fort Stark
3. Proposed marina & dredging
4. Naval Shipyard
5. Pierce Island
6. Four Tree Island
7. State fish pier
8. Strawberry Banke
9. Prescott Park
10. Memorial Bridge
11. PSNH power plant
12. Theatre-by-the-Sea
13. Granite State Minerals
14. Viking pier
15. Condominium/commercial complex
16. Nobles Is./Port Authority
17. Proposed dredging site
18. ME/NH Rte. 1 By-Pass Bridge
19. National Gypsum
20. I-95 Bridge
21. Sprague Energy
22. Simplex Wire & Cable
23. American Trawler

There are three bridges across the Piscataqua in Portsmouth Harbor. Seaward of the easternmost bridge, Memorial Bridge on US Route One, water access on north and south shores of the harbor is relatively open. The channel here is deep, but maneuvering space for large ships is limited. Public access to the water from land is difficult in the outer harbor because most of the littoral property is privately owned. On the Maine side, the Portsmouth Naval Shipyard occupies a large portion of the land area within the harbor. The shipyard is located on property which was once four islands, now reduced to three by fill. It is connected to the mainland by two bridges, one of which carries a marine railway. The channel runs close to the shipyard, creating some complaints of security problems by the Navy. The state-owned fish pier is also outside of the bridges on Pierce Island, and Prescott Park in Portsmouth provides some visual and limited physical access to the outer harbor. Pierce Island and Four-Tree Island also provide park facilities to the public.

Most of the port and dock facilities are up-river of Memorial Bridge. On the New Hampshire side, the "Old Harbor" area accomodates tourist cruise boats, tug-boats, wharfs for private business and industry, and the state pier on Nobles Island. All are between the Memorial Bridge and the Maine-New Hampshire Route 1 By-Pass Bridge which also accommodates the railroad. Besides these water-dependent activities, there are restaurants, shops and other businesses, and housing in rehabilitated buildings which benefit aesthetically from

proximity to the waterfront, although they are not directly dependent on access to the harbor.

Just west of the Memorial Bridge is a power plant soon to be abandoned by Public Service Company of New Hampshire. Studies are being conducted to determine how best to use this property to take advantage of its harbor-side location. Several restaurants, Theatre-by-the-Sea and other commercial and business establishments extends along Bow Street, many in buildings formerly used for port-related activities such as warehouses, to the Old Harbor. The Old Harbor accommodates tug boats, harbor sightseeing boats, Granite State Minerals' pier, and the Viking Cruises pier. More restaurants and shops occupy the ground floors of the buildings on the landward side of Ceres Street, with other businesses fronting on Market Street using the street level floors. The upper floors of some of these buildings have been converted for residential use.

The State Port Authority pier is on Nobles Island, connected to the mainland by fill and a roadway. It handles storage of scrap metals and other materials awaiting shipment as well as cargo shipped into the state by sea. Limited warehouse space is available for storage of shipments in transit, including a climate-controlled warehouse to accommodate the state's liquor imports. A container vessel makes weekly calls, and other commercial ships dock at the State Pier. A long-range plan calls for dredging the turning basin and adding a second state berth so that more than one vessel at a time can tie up at the State Pier. In addition, a rock ledge at Goat Island,

outside the Memorial Bridge, will be blasted. There seems to be no opposition to that plan in theory. The gravel obtained by blasting will be used as fill, but there are problems of disposal of dredge spoil and location of the second berth. In 1983 the Legislature appropriated \$600,000 for "plans and specifications for new dock and containment area" (Chapter 423 V, Laws of 1983).

Upstream west and south of Nobles Island are tidal ponds and marshy areas which offer habitat and feeding grounds for marine coastal wildlife and open space areas within the built-up sections of the city. Passing over the western end of Nobles Island is the Maine-New Hampshire Interstate Bridge on By-pass US 1, also a lift bridge. Beyond the By-Pass 1 Bridge the channel narrows and there is relatively light shore-front activity between it and the Interstate 95 bridge. There are plans for a museum and other tourist attractions for the area. Above that point shipping is specialized for large industries in Portsmouth and Newington before the estuary widens out into the Great and Little Bays.

Beyond this bridge there are private facilities for a number of industries which require shipments by sea, including Simplex Wire & Cable, National Gypsum, Sprague Energy, American Trawler, Dorchester Sea-3 LPG facility, Public Service Company's Schiller plant and several oil terminals stretching up into the Town of Newington. The I-95 Bridge is high enough to accommodate shipping without disrupting road traffic with a draw or lift.

Most of the commercial activities in and around Portsmouth Harbor are year-round except for harbor tours and the Viking cruises.

Description of Interests Involved

The state has begun to recognize the value in having an active port for its existing industry and to attract other investment and development. Commercial fishing continues as an important means of livelihood for a segment of the area's population. The role of the federal government as a major employer cannot be ignored as an economic factor. The Portsmouth Navy Yard, actually located in Kittery, Maine, has been a part of the Portsmouth Harbor picture since the early nineteenth century and is likely to continue as an important economic factor, as well as user of the harbor resources, in the foreseeable future.

There is relatively little private residential property directly on the New Hampshire side of the harbor. Condominiums are being developed in new and rehabilitated buildings on the southerly side of Nobles Island, across from the Port Authority pier. There is housing in some rehabilitated buildings on the Old Harbor, and much of the shorefront in the Town of Newcastle, on the outer harbor, is residential.

The City of Portsmouth has become an important New Hampshire tourist attraction, and businesses have developed along the waterfront to accommodate it. These include cruise boats (water dependent), and restaurants, shops and semi-public

facilities such as Prescott Park and Strawberry Banke (water enhanced).

Most commercial fishing is handled at the State Pier, outside the Memorial Bridge, although some comes into the Old Harbor area, and the American Trawler Company, a private fish-processing plant, is upstream of I-95. Facilities for private, recreational boating on the New Hampshire side of the Harbor, include the Prescott Park dock, a launch ramp at Pierce Island, and some seventy five moorings in New Castle harbor and another one hundred outside. Sport fishing is possible, but tidal currents and shipping traffic tend to discourage small boats.

Industrial and commercial shipping are dominant beginning in the old harbor area with Granite State Minerals pier, the State Pier on Nobles Island, and the industrial facilities, mostly oil terminals, which line the river up into Newington. There is little public access to the river up-stream of Nobles Island until it widens into the Great and Little Bays, and most industry is attracted to the area because of its water access.

The presence of the federal government is strongly felt in the outer harbor, in the form of the Portsmouth Naval Shipyard. With its large payroll and steady employment prospects, the Naval Shipyard plays a key role in the economy of the region. Eight thousand civilians work at the shipyard, which rehabilitates nuclear submarines on a fixed schedule extending well into the foreseeable future. The Coast Guard maintains a station on New Castle Island. The Army Corps of

Engineers has ultimate responsibility for dredging the channel and turning basins further upstream, in cooperation with both riparian states. State and federal governments share responsibility for the waterway and for protecting the sensitive wetlands throughout the coastal region.

The State of New Hampshire has an important interest in its only port which can handle commercial shipping. The state pier on Nobles Island has potential to serve business in Vermont, Massachusetts and Maine as well as New Hampshire business. It is presently limited by its single berthing facility and by limitations on road access. A major activity of the state pier is the shipment of scrap metal to European fabricators. But when the scrap is being loaded no other ship can use the pier. Thus the container ship sometimes is forced to go to Boston and other shipping which might use Portsmouth goes to other ports which can accomodate them on schedule. Construction of the second berth should alleviate this problem. But the piles of scrap, which interfere with the perceived aesthetic requirements of other types of port-area activities, have served as a focus of local dissatisfaction with the pier operation. (See City of Portsmouth v. John T. Clark & Son and State of New Hampshire Port Authority 117 NH 797 (1977) in which the City of Portsmouth sought unsuccessfully to control the scrap metal storage by enforcing the terms of its zoning ordinance.)

The Port Authority has recently qualified as a "Foreign Trade Zone" which provides a location where "foreign traders

can store, exhibit, sample, blend, mix, sort, repack and manufacture various commodities. "The primary purpose of the zone is to encourage the final processing of certain imported goods in the United States rather than in the country of origin. . . . The intent of the zone concept is to provide businesses with capital savings ...realized through reduced or deferred customs duties...."⁴

A report issued in 1975-76 by the Strafford Rockingham Regional Commission cited the expansion of the Port Authority Pier as an area of potential conflict, at least in part because it was not clear at that time what purpose the expansion was to serve. There was concern at that time that a major oil processing installation might be contemplated which would be wholly incompatible with other activities in the harbor area. That fear seems to be largely dispelled, and the kinds of commercial shipping now contemplated appear much more appropriate to the area.

The City of Portsmouth is obviously most concerned with harbor operations. Municipal officials expressed frustration with the fact that neither state pier makes payments in lieu of taxes, despite legislative mandates (RSA 271-A:17 (supp) 1977). However, George Smith of the Port Authority indicated that the state did in fact pay to the City \$30,000 per year in lieu of taxes and has done so since 1977. (The reasons for this discrepancy, and whether the payment is reasonable or adequate, were not explored.) These activities do of course require city services, and yet do not contribute directly to their support

nor are they controlled by city ordinances.

The towns of Newington and Newcastle also must be concerned with water access in the harbor area, but neither town has been separately studied.

Areas of Conflict and Competition for Resources.

With all this activity and the many interests involved in so limited and complex a resource, our interviews revealed surprisingly little report of head-on conflict among them. There seems to be general recognition that each interest has valid concerns which have a place in the life of the harbor, and that a cooperative approach to problems and conflicts will lead to a more productive and positive result than would confrontation.

Two organizations are key to this cooperative effort. The Greater Portsmouth Chamber of Commerce Port Committee was "created to increase and heighten the utilization and awareness of The Port of Portsmouth." It includes representatives of businesses in both Maine and New Hampshire who have actively worked to promote development of the Port. The Portsmouth chapter of the Propeller Club, a national social and civic group composed primarily of commercial interests and industrial shippers, promotes development and safety in the harbor area. It also provides information to its members about state and federal regulations and other pertinent activities.

This is not to say that there are no problems or incompatible proposals for use of the harbor resources. It is

rather to acknowledge that most of the port users publicly recognize that they are each part of a larger picture and must compromise with one another in the best interests of the entire region.

Having made this point, we were able to identify a number of areas of concern which if addressed might further enhance the multiple compatible use capability of the harbor. These fall into the following categories.

I. Government

1. State-local-private industry relations. There was feeling that the Port Authority had too many concerns beyond the harbor itself and tended to be distracted from its major job of planning "for the maintenance and development of the ports, harbors and navigable rivers . . . to foster and stimulate commerce and shipment of freight through the State's ports" (RSA 271-A:2). The opinion was expressed that users of the port should be represented on the authority and that the authority should better communicate and coordinate its activities with the municipalities and private industrial and commercial users of the port. It should be noted here that those interviewed spoke favorably of the present director of the Port Authority, Mr. George Smith, generally confirming that despite minimal support from state funds, he is providing positive leadership for the Port Authority.

2. Lack of coordination among state agencies was a major complaint of private business and industry. The Chamber of

Commerce Port Committee has identified some 60 statutes and 19 agencies which have some jurisdiction over the harbor and its activities. Major concern dealt not with environmental regulations as such, but with inefficient processing of applications and unclear directives for mitigating potential damage from a proposed operation.

3. Funding for port development, maintenance and marketing was identified as a concern by several people interviewed. Presently fees imposed by the state for most services in the port area are deposited in the general fund and treated as tax income. The service paid for may not be fully provided and maintenance of facilities tends to be inadequate to properly serve user needs. Development projects cannot be planned according to user needs and input, but must depend on the political process for authorization and appropriation.

4. Funding was also a problem in enforcement of existing regulations and permit conditions. The state lacks manpower to make regular inspections of permitted operations to assure that any pollution control systems are properly monitored and that any malfunctioning system or bypass operation is shut down before damage is done. Cleanup of pollution after the fact, where it is possible to do so effectively, is invariably more expensive than prevention, and such cleanup cost must often be borne by the public, at least in the first instance.

5. Security is of course a prime concern for the Naval shipyard. The policy of the shipyard administration is to take a low profile approach to the issue, calling on the Portsmouth

harbor master when tourists and fishermen on the harbor side fail to respond to verbal warnings from the base's own security vessels.

II. Business and Industry

1. The limited physical size of the resource inevitably leads to competition among different types of water-dependent and water-related uses. In particular, private yachting and commercial tourist activities must compete with commercial and industrial shipping operations for limited mooring, docking, pier and land facilities. The Chamber of Commerce Port Committee serves as a forum for discussing and recommending solutions to some of these issues. Whether a more formal process is needed was not clear from our interviews. The Port Authority now has a professional administrator who is responsible for managing the logistics of harbor operations. A mechanism based on criteria such as water-dependency, environmental impact, economic impact and impact on existing or other proposed activities, and even aesthetic considerations could be worked out to assist city, state and private interests in planning and implementing development in the harbor area.

2. The salt piles of Granite State Minerals and the scrap metal piles on the Port Authority pier have been an issue for other existing and potential enterprises in the harbor area. Given the extremely limited physical space available in the harbor, it is not clear what mechanisms might be developed to reduce potential conflict while allowing for continuation of

these bulk commodity operations and opening up the harbor to other kinds of uses.

III. Natural Environment

1. The harbor area provides habitat for aquatic life of many kinds, and concern for the well-being of fish, birds and other wildlife competes with development interests. Municipal sewage remains a concern in the Piscataqua estuary. Industrial pollution is less of a problem except when an oil spill or other accidental occurrence damages an area. The Harbor has peculiar problems of spill control because of the swift currents. The conventional containment of spilled oil by "booming" is not effective and a system of "deflection booming" is being developed to divert a spill into a cove and onto land where it can be dealt with, avoiding the danger of widespread dispersion.

2. Aquaculture (or "Aquiculture" as it is spelled in the state statute relating to the rearing of aquatic organisms RSA 211:62-e), is a relatively new activity in the coastal area. Municipal sewage pollution, as it presently exists, is not a serious problem for this potential industry, but industrial pollution, such as oil spills or chemical contamination can be disastrous. Two types of aquaculture were identified.

(a) An oyster seeding and rearing project is now commercially maintained by York Harbor Export, Inc. and its proprietor Kevin Tacy. The project was initiated as a result of studies begun under a grant from Sea Grant. Oysters are brought to market size from seed in various parts of the Great Bay, then brought to a location in the Little Harbor south of

Newcastle Island for a two week period of cleansing or "purging." An oil spill in the Great Bay can wipe out an entire crop. A proposed marina, requiring extensive dredging in the Little Harbor area would eliminate the only location on the New Hampshire coast suitable for the purging operation according to Mr. Tacy. Polluted oysters cannot be transported across state lines, so an out-of-state alternative cleansing location is not feasible, unless laws are changed in a neighboring state, in this case presumably Maine, to allow for it. (Mr. George Smith of the Port Authority indicates that he believes that there are other areas on the New Hampshire coastline suitable for the purging operation. This conflicting report has not been resolved.)

This is a case where uses are mutually exclusive, and no solution to allow for both uses is apparent at the site or elsewhere on the New Hampshire seacoast.

(b) A sea ranching project is underway to raise salmon for the commercial market, directed by Professor Philip Sawyer of Sea Run, Inc. and the University of New Hampshire. Fish are hatched and raised at an inland hatchery and shipped to the coast for release above the dam at Newmarket. They must of course traverse the harbor to get to sea, and, a year or two later, to return to the river where they will be recaptured. When they return, the fish must run a barricade of sports fisherman. As fish in public waters they are public property and there is no restriction on who can catch them, except that they cannot be taken commercially. A successful fish-ranching

venture would require some changes in the law to allow for recapture of relatively large number of the fish by commercially viable methods.

The sports fishermen are not considered a problem, nor is the existing level of pollution from municipal sewage. However, industrial pollution can be a significant threat, especially if a sudden spill should occur at the time the fish are released or when they are due to return.

3. Despite the commercial and industrial development along the harbor and the outer estuary, there are still areas of important wildlife habitat. Both municipal sewage and industrial pollution are problems for much of this kind of habitat. Some communities up river continue to discharge raw or almost raw sewage into the waterways which empty into the bays and harbor. Rochester and Exeter, in particular, have only the most primary treatment, that is settling lagoons, for their sewage. Industrial pollution is much reduced, but inadequate enforcement has on occasion permitted situations to become serious before they are apprehended and curtailed. Sudden spills are of course a major concern. Continuous monitoring is necessary to prevent them and, when they do occur, to provide for quick cleanup and to minimize the adverse impact.

4. New Hampshire Fish and Game and the U.S. Fish and Wildlife Service both oppose the plan to expand the Nobles Island Port Authority Pier with spoil from the proposed dredging of the turning basin. The major concern is for destruction of habitat for birds and shellfish.

Recommendations and directions for future study

1. Lack of coordination among state agencies was a recurring theme in our interviews. The Department of Fish and Game has no formal liaison with the Port Authority. Nor has the Port Authority a seat on the Wetlands Board which is responsible for acting on applications for dredge and fill projects in both coastal and freshwater wetlands. The U.S. Army Corps of Engineers must also approve of dredge or fill proposals in coastal wetlands and waterways, but communication between the Corps and the state Wetlands Board is minimal. The Water Supply and Pollution Control Commission, responsible for both private and municipal sewage disposal, should set its priorities in consultation with the Department of Fish and Game, among others.

One agency in the coastal region should be mandated to take the lead in coordinating the permitting process and seeing that both state and federal requirements are met by any given project. The Port Authority might take on this responsibility, but it would require additional funding and administrative authority.

2. Lack of long-range planning, taking into consideration all of the interests identified, leads to confusion and conflict. Again a lead agency, perhaps the Office of State Planning in cooperation with the Port Authority, should undertake this kind of planning. Under the federal Coastal Zone Management program, a beginning has been made. But the Port of

Portsmouth itself, seems to have received less attention than some other areas.

3. A major area of conflict is the storage of bulk commodities at dockside. Portsmouth Harbor is a very small area, and piles of scrap metal and road salt have become landmarks on the waterfront. The City of Portsmouth attempted to force the State to remove the scrap metal through its zoning power, but its appeal failed because the state is not subject to local zoning ordinances (City of Portsmouth v. John T. Clark & Son, Inc. (1977) 117 NH 797, 378 A2d 1383). Those involved in the shipping industry argue that, unlike other types of development proposed or existing in the area, their business requires storage at dock-side and should take precedence.

Thus far no acceptable compromise has been proposed to accommodate both interests side-by-side, and the conflict continues. Any solution will be based more on economic than on legal considerations.

4. The use of state imposed fees for services or use of state facilities should be reviewed. If the fee is a tax, it should be labeled as such and can be legitimately devoted to general state purposes. However, if it is a fee for service rendered, it should reflect the service and be used to assure that the facility so supported is adequately funded. Fees are often set by the legislature without consideration of the cost of service. Much of the state activity in the seacoast area is proprietary, or at least proprietary in nature. These should be studied to determine whether any given service is in fact an

appropriate state activity, whether its continuation at its present or some other level is in the long term interest of the state and its inhabitants, and to identify the most cost effective way of delivering services. Some services should probably be supported by tax revenue. Others can appropriately be self-supporting. This is a facet of long-range planning which must be constantly monitored and updated.

5. A related concern is enforcement of regulations, especially in the area of dredge and fill and pollution control. State pollution control agencies tend to be undermanned as well as uncoordinated. Inadequate monitoring of permit conditions is a chronic problem. The State needs to develop a coordinated enforcement team to inspect for compliance in water pollution, dredge and fill, hunting and fishing, boating and other concerns. The Coastal Zone Management program has some on-site capability presently supported by federal funds. But it is inefficient for each to support a separate enforcement section, especially where their concerns are closely related.

6. Additional study will be required to determine what changes in the law may be required if aquaculture becomes commercially viable on a larger scale. It is premature at this time to propose any legislation. However, background preparation should be started in time to develop appropriate mechanisms for regulation in the public interest.

In none of our discussions concerning the marina proposal in Little Harbor did anyone but the owner of the business recognize that the oyster raising business would be destroyed by

the project. It must be noted that we did not look at that project in any detail, so we must assume that agencies are aware of this conflict, although it was not mentioned specifically to us. We have been referred to a study on the impact of the proposed marina by the Kimball Chase Company, and engineering firm in Portsmouth, but we have not examined it for this study.

FOOTNOTES

1. Hershman, Under New Management: Port Growth and Emerging Coastal Management Programs, 1978.
2. Port of Portsmouth Handbook, 1983-1986, page 33.
3. See Romoser and Lagassa, Portsmouth at the Crossroads, New Hampshire Council for the Humanities, 1978.
4. Port of Portsmouth Handbook, 1983-1986, page 15.

SEABROOK/HAMPTON HARBOR

Introduction

Our research for Seabrook/Hampton Harbor region included field trips to view the area and interviews with residents and other interested parties. We appreciate the cooperation and guidance received from the following individuals, who gave of their time to discuss the issues with us:

Stanley Hamel, Chairman, Seabrook Conservation Commission

Jane Kelly, Town Clerk, Hampton

Eric Small, Administrative Assistant to the Selectmen,

Town of Seabrook

Glen French, Hampton Beach Chamber of Commerce

Ray Gilmore, Smith & Gilmore Party Boats

George Smith, Smith & Gilmore Party Boats

John Fitzpatrick, Hampton Marina

The Honorable Beverly Hollingworth, State Representative,
Hampton

The Honorable Robert Preston, State Senator

Bruce Beckley, Public Service Company of New Hampshire

Jane Doughty, Executive Director, Seacoast Anti-Pollution
League (SAPL)

Charles W. Eastman, Jr., Eastman Party Boats, Seabrook

Al Gauron, Gauron's Deep Sea Fishing, Hampton

Frederick Clews, Hampton Harbor Master

Marcia Keller, Office of State Planning

Ken Lang, State Fish Piers, DRED

Ted Spurr, New Hampshire Fish & Game

Frank Richardson, Wetlands Board

Sarah Thorne, Society for the Protection of New Hampshire
Forests

I. Description of the Resource in its Natural State

The Seabrook/Hampton tidal basin (known as Hampton Harbor) is enclosed behind two barrier beaches at the southern end of the New Hampshire coastline. Access from the ocean into the harbor is through a channel running between Hampton beach, to the north, and Seabrook beach, to the south. The backside of the beaches form a large shallow basin bounded by tidal flats and marsh. The Hampton, Brown's, and Blackwater Rivers feed fresh water into the basin and a number of smaller creeks run through the marshes, dividing them and creating marshy islands. These tidal creeks carry nutrients and sediment into and out of the marsh, providing a fertile spawning ground for various marine species and causing siltation in the harbor. This interaction has resulted in a number of clam flats on the western side of the harbor as well as increasingly narrow and shallow navigation channels. Eventually, given no interruption in the natural processes, the harbor basin will fill in completely by accretion to the existing marsh.

The Blackwater River empties into the southerly end of the harbor after meandering through the Seabrook marshes. It has deposited a great deal of silt in the Seabrook end of the harbor creating large flats. The thread of the river is, at most, two

to three feet deep during low tide. Brown's River empties into the harbor from the western side, bounding the towns of Seabrook and Hampton Falls. Channel depth is only one to two feet at low tide. The Hampton River runs into the harbor from the northwest corner of the basin. It also acts as a natural boundary line, dividing Hampton from Hampton Falls. The river's current is somewhat stronger than that of the Blackwater due to encroachment of the marshes. Thus it's mid-channel depth remains between three and four feet at low tide, at least in some spots, allowing access to the northerly creeks. There is a large mussel bed on the easterly side of the channel at the mouth of the Hampton River.

The inlet to the harbor is also filling in. This is caused primarily by the long-shore current which runs south along Hampton Beach. The current sweeps sand off the beach and deposits it at the southerly tip where tidal action can carry it into the channel. The long-shore current, while adding to the Hampton barrier beach, is eroding the northerly end of the Seabrook beach. The erosion on the Seabrook side of the channel is less rapid than the accretion on the Hampton side. The long-shore current is deflected away from the shore and out and around the seaward-projecting sand spit at the southern end of Hampton Beach, diminishing its action on the relatively more westerly tip of Seabrook. Thus much of the sand coming off Hampton Beach stays in the channel once it is deposited there by the tides.

II. Human Impact on the Resource

The impact of human activity overlays the natural processes occurring within the basin. This description begins at the northern lip of the harbor inlet and follows the northerly shore west by northwest to the Hampton River, thence turning and running south along the marsh and Browns River to the Blackwater River, thence turning and running northeast by north along the back side of Seabrook Beach to the harbor inlet, thence east along the southern side of the inlet to the point known as Beckmans. The town line between Hampton and Seabrook is actually on the southern side of the harbor inlet; Beckman's Point is within the town of Hampton.

A. HAMPTON HARBOR

Some of the man-made physical changes in the harbor are fairly permanent and stable; others need regular maintenance. The first man-made structure we encounter, following the outline above, is a jetty which extends into the ocean off the northern tip of the inlet. The jetty was built to catch the sand being swept off the northern stretch of beach. At this time, the sand has totally filled in behind the jetty and exceeds the jetty's capacity. Thus the sand builds up at the tip of the jetty and spills out around it so that the harbor inlet channel to the south is being filled in. The Army Corps of Engineers is responsible for maintaining this outer portion of the channel. Although they dredged it in November of 1982, the sand had refilled the channel near the end of the jetty by June, 1983. This problem causes the larger vessels using the harbor to detour

outside the channel at this spot to avoid running aground. Working our way west from the jetty we found the former back dunes area had been leveled, filled and packed for use as a state park parking lot with rip rap stabilizing the shore along the inlet to prevent erosion. West of this is the Bascule lift bridge which links Hampton Beach with Seabrook, crossing the inlet close to the harbor itself. The bridge is operated by the State Department of Public Works and Highways and is manned during the three hours before and three hours after high tide. At all other times the operators are on call and will open the bridge if given prior notice. The bridge has only an eighteen foot vertical clearance at high tide so that it must be opened for most larger craft and even small sailboats. The larger party boats which use the harbor as a home port are all "low profile" so that they can enter and exit at all tides without the bridge being opened.

On the inland side of the bridge the state is responsible for maintenance of the channel. The state owns the land immediately to the west of the bridge and has put in a retaining wall and paved the area. The state operates a commercial fish pier, launch ramp, and dock for recreational boaters in this area. The state charges fees for launching, parking and for use of the fish pier services. The yearly fee for use of the fish pier is \$100.00 to \$125.00 per year for each fisherman. At present the only service provided is winches for hauling up the catch, although the state is considering the addition of fuel pumps. The recreational dock is used only for loading and off

loading passengers and there is a limit set on the length of time that any one boat can remain tied up there. There are only a couple of state attendants for the entire area and since one of the party boat operators uses the same dock for loading his customers, some conflicts have arisen as competition for space at the dock becomes more intense during the height of the summer season. The area cannot be well policed to ensure time limits for docking are honored due to the lack of attendants.

Mr. Al Gauron, who operates four party boats, uses the state recreational dock for his customers to embark and land. He pays a rental fee to the state for the use of a portion of the state parking facilities for his customers and moors his boats in the harbor. Mr. Gauron owns a small plot of land abutting the north east corner of the state site where he resides and operates his business office.

Further along the harbor shore and next to the state fish pier is privately owned land belonging to Pier Properties and run by the family of Mr. George Smith. This area, once marsh, was filled many years ago. Mr. Smith's nephew, Ray Gilmore, runs a deep sea fishing party boat operation on this site. Structures at the site include a pier, outbuildings, and their private boat yard. The pier, extending into the harbor, is primarily used for embarking and landing customers and their catch. The four boats owned by Smith and Gilmore Party Boats range in size from fifty to seventy-five feet and are moored in the harbor rather than berthed at the pier. The buildings on the site include a bait and tackle shop and a retail lobster pound. The latter is not

run by the family but is rented out to a private company.

Abutting Smith and Gilmore is another parcel of private filled land with a residential dwelling and a private pier built by the owner, Mr. Dubee. Next to this is a tiny branch office of Normandeau Associates, Inc., a company engaged in scuba diving research for the Public Service Company of New Hampshire to determine what impact the nuclear power plant may have on the marine life in the harbor.

The next parcel of filled land is a six and one half acre marina owned by George Smith and operated by his son-in-law, John Fitzpatrick. The marina consists of a boat yard, man-made berthing basin, a large warehouse, and various outbuildings, including a small cottage used as a home by Mr. Smith. The berthing basin holds about eighty small craft and is always filled during the boating season. Services provided by the marina include dockage, storage, fuel, hardware, hoists, hauling and launching. There is room to expand and develop the business but a number of economic and regulatory hurdles would need to be dealt with first. These include the various state and possibly federal permitting processes involved and the competition from the state operated pier facility. Since the state facility was built four or five years ago, use of the marina launch ramp has dropped off. If the state adds fuel pumps to their pier, expansion of existing fuel services at the marina may not be cost effective. In addition to these considerations the marina is a seasonal operation and any capital improvements must be carefully weighed in terms of their economic viability.

The mussel bed mentioned in Section I above is in front of the marina, to the left of the entrance to the marina basin. To the north and west of the marina is marsh and the Hampton River. The marina is the last major filled-in portion of the eastern harbor shore and the Hampton Beach residential development extends north and east behind it.

Heading north by northwest, further up the Hampton River, past the area known as The Willows we eventually reach Nudds Canal. The Hampton Boat Club is located on Nudds Canal so that only shallow draft skiffs can get out to the harbor at present

B. Seabrook Harbor

On the southwest shore of the Hampton River and the western side of the harbor are the large open areas of tidal marsh and Browns River. The Public Service Company of New Hampshire's Seabrook Nuclear Power Plant site is in the upland and filled areas of this marsh south of Browns River. The plant is located on 715 acres, two thirds of which is, or was, marshland. The Nuclear Regulatory Commission usually requires a two-mile radius of control from the center of the plant but this was reduced to 1.25 miles to accommodate the Public Service Company's site at Seabrook. The NRC Safety Evaluation Report indicates that the site is 896 acres according to the Seacoast Anti-pollution League (SAPL). We have not attempted to resolve this discrepancy.

Rocks Road launch site on Browns River, one of three town owned ramps, is located near the Seabrook Plant. This launch is closed at the present time due to its proximity to the

construction site. The Public Service Company of New Hampshire may reopen the site once the plant is completed although there are security problems to be dealt with. A second launch site, Farm Lane Dock on Walton Road, is between the Seabrook Plant site and the Blackwater River.

South and east of the Seabrook Plant is the Blackwater River. Cross Beach, a traditional summer colony east of the Blackwater, is only partially accessible by land at high tide; some area residents want to add sufficient fill to provide access at all tides. Northeast of Cross Beach is the Seabrook Beach area, divided by Route 1A running between the front and back dune. The back dune area consists of three to four hundred acres and is mostly undeveloped. At the northern end of the back dune, where it meets the marsh, a leveled and filled area supports commercial and tourist establishments as well as the Seabrook Police Station. There is a municipal launch ramp at this site and a privately owned dock and pier belonging to Bill Eastman. Mr. Eastman runs a party boat operation from his pier, catering to deep-sea fishing, whale watching, and sight seeing.

There is a navigable channel running from this point north along the western side of the flattened dune to the harbor inlet. The channel depth ranges between 5 and 6 feet at low tide when it has been recently dredged. Small craft and the party boats are moored at the southern end of the channel which provides the only real exit from the Seabrook side of the harbor. On the western side of the channel are clam flats and on the east is the flattened dune. Where the dune used to be is a town parking lot

and beach for residents only, the Public Service Company barge facility, and Rte. 1A. At the northern end of the flattened dune is the Bascule lift bridge and Beckman's Point. As noted previously this land is actually part of Hampton. On the eastern side of Route 1A, along the harbor inlet and south, are summer homes built on the leveled front dunes. The beach and what remains of the front dunes are owned by the town to a line six feet from the most seaward cottages.

INTERESTS INVOLVED

I. GENERALLY

The Hampton-Seabrook area is a well known, long established summer colony. The year round residents depend chiefly on the seasonal tourist influx to sustain them for the rest of the year. Thousands of tourists visit the long sandy beaches each year and the majority of residential units are rental cottages tightly packed in two discrete areas known as precincts: Hampton Beach and Seabrook Beach. Each of these precincts is a separate village district within the parent town, having a measure of self-regulatory authority under the enabling statute, RSA Chapter 52. Use of the Hampton Harbor itself is limited by the shallow bottom, low bridge, and the undeveloped, now legally protected marsh.

a) BOATING

Commercial establishments on the eastern side of the harbor basin cater to the summer trade, including the water dependent party boats and the marina. In addition to the twelve party boats and the eighty odd small craft based at the marina,

there are usually some two hundred boats moored in the harbor during the summer months. A harbor master for each town is appointed by the New Hampshire Port Authority. His tasks include allocation of mooring space and collection of fees. The limited availability of moorings causes some competition among boat owners, and there is always a waiting list for the limited space.

Non-tourist commercial fishing boats using the harbor for a home port include about 25 skiffs and 15 boats used for lobstering, 12 draggers and 6 gillnetters. The fishing vessels are all day-trippers because the harbor cannot accommodate larger boats and dockside services are limited. The majority of fishermen operate only during the summer months with no more than four or five working year round.

Tourist and recreational fishermen include both those using the three party-boat services and those with their own small craft. Others fish from land or surf cast.

Clamming is limited to state residents by statute (RSA 211:62-a) and no commercial clamming is permitted.

b) Tourist

Commercial land based establishments are, for the most part, limited to summer operations. These are located in the intensely developed Hampton Beach Commercial district which runs the length of Hampton Beach along Route 1A. Restaurants, novelty and clothing shops, arcades and motel/hotels line the beach. The Hampton Beach Chamber of Commerce has been active in planning and implementing new commercial attractions. The Chamber hopes to

extend the season by establishing a year round attraction, such as an aquarium, near the beach. A new privately owned trolley bus began operating along Hampton Beach during the summer of 1983, with a connecting run into Hampton Center. The trolley provides the area with an attractive and practical alternative to parking at the crowded beach front. The Chamber of Commerce, the town, and the state cooperate in providing entertainment and activities at the state owned amphitheater on the beach.

c) State and Local Government

State interests in the Hampton-Seabrook area encompass recreational and commercial services. The town of Hampton deeded the beach proper to the state with the stipulation that no commercial development be allowed on the beach. The state runs the state park and pier at the southern tip of Hampton Beach. It collects revenues from metered parking along the length of Hampton Beach, attended parking lots and the state run launch ramp at the southern end of Hampton Beach, the state commercial fishing pier service fees, mooring fees, and the business profits tax collected from merchants. Appropriations under Chapter 423:1 (VI),(D), Laws of 1983, were allocated to DRED for "repairs to seacoast parking areas (guard rail for seacoast parking area, constructed of wood posts and Corten)." These allocations took the form of five year bonds totalling \$180,000.

Legislation enacted in 1983 will produce additional revenues from both resident and non-resident commercial salt water fishing licenses. The proceeds will go to the New

Hampshire Fish and Game Department. Laws of 1983, Chapters 254 (effective 8/17/83) and 81 (effective 7/23/83) respectively, amending RSA 211.(see also RSA's 206:33, 211:70 , 211:58, 214:9, 214:15).

In addition, the state collects license fees from lobstering and clamming. RSA 211:62-a; RSA 211:18. The numerous clam flats in Hampton Harbor are owned by the state and are regulated by the state Fish and Game Department under RSA 211:62-a. Area residents have raised concerns about the state's management policies regarding the clam flats. Because the state needs the permit fees, they may be issuing more permits than the resource can accommodate. The clamming permits are issued only to state residents between Labor Day and Memorial Day, but insufficient enforcement personnel prohibits effective prevention of off-season clamming.

Local government obtains revenues from property taxes, leasing out town owned land (which comprises the majority of property in Hampton), and operation of town owned parking lots.

II. Seabrook Special Interests

Seabrook has fewer commercial establishments near the harbor than does Hampton. These are primarily seasonal restaurants and the Eastman Party boat operation. The rest of the area is residential cottages or open land as described earlier. The town operates a parking lot for town residents and a municipal launch ramp.

The privately owned dunes and marshes are controlled by state regulation under RSA 483-A and local building ordinances.

Some three hundred plus acres of the undeveloped back dunes are presently privately owned and there has been a great deal of public interest in protecting them from potential development. The recently revived Seabrook Conservation Commission is actively working to preserve the remaining dunes. The Commission is trying to persuade the town to purchase the area. The town has contracted with a private firm for a feasibility study of cost effective methods to obtain control over the resource.

The Public Service Company of New Hampshire is the town's major source of revenue both through property taxes paid and employment opportunities provided. The logistical problems related to construction of the Seabrook Plant have created some permanent changes in the town. The Public Service Company built a road on top of the marsh ten years ago. The road was to be removed once the Plant was complete but now it may be impossible to remove without further damaging the marsh. In addition to the road, the Company's barge facility was built on town property by agreement with the town. As part of the agreement the facility was offered to the town but the residents voted to have the Company remove it rather than pay the upkeep. At this time the Port Authority has acted to delay dismantling it pending further investigation of possible uses for the facility.

AREAS OF CONFLICT AND COMPETITION FOR RESOURCES

The competition for resources in the Hampton/Seabrook harbor area is delineated along tourist/non-tourist lines. The

beaches attract hundreds of thousands of visitors every summer and both public and private coffers benefit from the seasonal influx. Competition for the tourist dollar is seen in the form of State versus local interests. Tourist and non-tourist dependent interests clash within both the private and public sectors. Underlying many of these intra and intersector conflicts are the disparate interests of conservationists and expansionists. Development of the harbor is presently limited by laws protecting the marshes and remaining dunes and by lack of state funding for expanding the potential capacity of the waterway. Major concerns are outlined below.

I Government

1. State versus local government. The state collects revenues from parking meters and lots as well as from taxes levied on the profits of private entrepreneurs. There has been some resentment expressed concerning the return flow of funds from the state to the locality. According to the Hampton Beach Chamber of Commerce the state receives at least ten dollars in revenue for every one dollar it allocates to the area.

2. State versus commercial interests. Dissatisfaction with the state operations in the harbor includes the lack of channel maintenance and available mooring space. The high fees charged for the small number of services provided at the state run commercial fish pier and the mooring fees for those people who are able to get a space go to the General fund and are therefore not returned to the area except through specific authorization by the legislature.

3. Local versus local interests. The Town of Seabrook receives the majority of its revenues from property taxes paid by the Public Service Company. Although area businesses are presently benefiting from income spinoff while the nuclear generating plant is under construction, other towns will receive none of the present or future tax revenues from the property. The Town of Hampton in particular will be exposed to the same potential risks which may adversely affect its business interests should any problems develop with the plant once it is on line.

II Business and Industry

4. The state's role in a commercial enterprise such as the pier rankles some of the local business people who do not have the resources of the state treasury at their disposal but who are put in the position of having to compete for the same business with their limited resources.

5. Competition between tourist and commercial fisherman appears limited to allocation of existing land-based facilities. Pleasure boats and recreational fishermen use the state docking facilities as do the commercial party boats run by Al Gauron. This causes some conflicts when the users do not abide by the time limits for docking.

6. Competition between tourist and non-tourist interests is clearly defined in the case of the Public Service Co. nuclear power plant . The concerns voiced by local business people include questions as to personal safety, public fear of visiting the area and the negative impact on business , and the adequacy

of evacuation routes available considering the number of people at the beaches on a summer day.

7. The attraction of the Public Service Company plant, especially its elaborate education center, has already brought 200,000 visitors to Seabrook. Some come specifically for this purpose, especially school children who come for class trips. Public Service Company is anxious to point out that \$25,000,00 per month is spent by the project in New Hampshire during construction, most of it in the southern seacoast area. However, most of the concerns expressed by other interests focussed on the plant's effects once it is in operation.

III Natural Environment

7. Protecting the limited clam flats and natural habitat of the marshes is of major concern to both state and local interests. In addition to potential pollution problems associated with further development of the harbor, the nuclear power plant may impact the area marine resources both passively and actively. Studies are being conducted by Normandeau Associates under contract to the Public Service Company to determine projected impact on the harbor flora and fauna during normal operations of the plant. In response to concerns of local and state citizens, the legislature recently enacted "An Act Requiring a Consequence Analysis Study for the Seabrook Nuclear Power Plant" Chapter 196, Laws of 1983 (effective June 16, 1983). The Act requires a special panel to study the effects of a "worst case" scenario of a core melt down at the plant.

8. The Seabrook back dunes area is an example of continuing concern over development control. Area residents seeking to protect the remaining open spaces are at the mercy of an underfunded overworked system of state and local regulation. The Wetlands Board and local building inspectors are responsible for ensuring compliance with the permitting process and the local ordinances restricting building in protected areas. Lack of funding and manpower hampers these efforts and the burden falls upon the neighborhood watchdogs to inform the authorities when someone decides to build without first obtaining permission to do so. This leads to compromises with the noncomplying parties and lack of uniformity in applying the land use regulations. The federal Coastal Zone Management program has provided funding for the Wetlands Board enforcement program and violations have dropped while enforcement has increased. CZM funding will eventually dry up and there is concern about whether the state will to continue to fund the program.

RECOMMENDATIONS AND DIRECTION FOR FUTURE STUDY

1. State and local issues and jurisdiction

A general concern about state involvement in local problems emerged from our interviews. The state's role in management and control of the Seabrook/Hampton harbor encompasses a variety of activities and has drawn criticism from local residents on all fronts. Complaints included (1) the perceived over-involvement of the state in proprietary functions, that is activities which are not strictly governmental and which are perceived to compete with private undertakings; (2) inequitable distribution of state tax money relative to the amount of revenues collected from the region; (3) over-regulation of privately owned resources; and (4) lack of enforcement of existing regulations and ordinances.

Although the complexity of these issues prevents us from adequately addressing them in detail given the limited scope of this study, we note their existence and offer some general guidelines for consideration.

(a) State competition with private enterprise. The State should review its activities to determine whether some of them could be more efficiently undertaken by the private sector. Serious consideration should be given to whether an activity is an appropriate governmental function, providing a necessary or desirable public service, or whether it is in fact a proprietary function competing with public funds against the private sector. In those cases where studies show that the service can be

provided at reasonable cost as well as or better than by a public agency, the State should develop a mechanism for divesting itself of such activities encouraging private interests to take over the function.

(b) Allocation of state revenues. It was not entirely clear how justified was the concern about unfair allocation of revenues by the state. Analysis of state income and expenditures in the area would be required to determine whether unfair burdens are in fact being placed on a particular area. There is question as to whether state fees for service are excessive or, on the other hand, whether some may in fact be subsidized by general state revenues. This issue also relates to the issue of state versus private enterprise discussed in paragraph (a) above.

Allocation of revenues obtained through licensing, permit and service fees, as well as other state revenues now obtained from the localities and presently allocated to the general fund could be accounted for and dispersed through such an agency according to a formula determined by the legislature. Such a formula would need to reflect the individual agencies' program needs and overall state policy considerations.

Interagency coordination.

(c) Regulation of privately owned resources. There is a natural conflict between the interests of the public at large and the private landowner. This is reflected in the complaint that the government, whether state, local or federal, exercises too heavy a hand in control of the use of private property. The

development and adoption of a comprehensive plan and clearly articulated public policy on development and preservation of coastal resources may help to mitigate this concern and provide for consistency in regulation.

(d) Failure to enforce existing state and local regulations. This complaint was heard throughout our study. Reasonable regulations may be on the books, but they are sporadically enforced, and can often be ignored by an individual with little fear that effective enforcement action will be taken. Coordination of state agency field personnel and prompt agency level adjudication of violations would serve to increase credibility of state regulation. Selectmen should be provided with a mechanism to enforce town ordinances in the first instance, short of protracted superior court proceedings.

2. Coordination among state agencies. Coordination among the various state agencies responsible for regulating use of the harbor and its resources is lacking. The harbor area residents, encompassing three towns and two precincts, look to the state for comprehensive management policies and control of shared resources. At present state authority over these resources is split among several state agencies, some with overlapping jurisdiction; ie: Department of Fish and Game, Water Supply and Pollution Control Commission, Water Resources Board, Wetlands Board, State Port Authority, Department of Resources and Economic Development, Office of State Planning. A single agency charged with primary responsibility for interagency coordination

is needed. Such an administrative structure should be designed to improve the effectiveness of individual agencies as well as to eliminate overlap and conflict among agencies.

A centralized, cooperative clearinghouse for interagency coordination should also enable the harbor area residents to determine agency jurisdiction and rules, obtain information and air grievances in one place.

A single agency might also coordinate and disperse information concerning federal regulatory requirements effecting state and local actions. Federal agencies involved include the Army Corps of Engineers, Coast Guard, Environmental Protection Agency, Fish and Wildlife Service (Interior Department), Department of Energy, and the Office of Coastal Zone Management.

3. Comprehensive long-term planning and implementation

In order to provide a comprehensive oversight agency with powers as described above, a review of present state policies governing the various areas of concern should be undertaken. Much of this has been accomplished already with federal Coastal Zone Management funds, although attempts to adopt a comprehensive plan have failed to date. Emphasis on local participation in management of state-owned resources may allow the recommendations already developed to be reassessed and implemented in a manner more acceptable to local communities. Certainly preservation and availability of the clam flats and fish nurseries are of concern to area residents who rely for livelihood on sport and commercial fishing. Management of the

state fish pier, mooring allocations, channel dredging, fill and dredge permits, parking facilities, as well as infrastructure repair and maintenance also affect local residents at one time or another.

A state management policy for the seacoast is needed. A general policy which will allow more local involvement in developing specific plans for each community's needs should be formulated. Breaking down the comprehensive plan into manageable chunks which could be implemented a little at a time in keeping with an overall policy would allow needed changes to be made without waiting for total agreement on a complete plan. An agreement on state policy may be more easily achieved than one concerning substantive plans. Local autonomy is highly prized in New Hampshire and the seacoast area is no exception. Encouraging local participation in state management planning should be a primary focus of any formulated policy.

4. Preservation and management of development

Specific areas of concern include the preservation and management of the Seabrook dunes. Similar but more general needs include enforcement of local zoning ordinances and building codes and state permitting procedures to control development of the remaining open land around the harbor and preserve the most valuable open-space assets. Enforcement of state protection mechanisms now in place requires continual funding and is thus limited by the budget allocations made by the state legislature and monies available through the federal

Coastal Zone Management program. As funds from the federal program dry up, responsibility for enforcement funding will fall fully upon the state. Considering the reluctance of the state legislature to allocate funds for enforcement and monitoring, alternative methods of financing should be considered. Bonding requirements, realistic civil fines, mitigation and restoration by the violator are among the mechanisms that might be used. An incentives program might be developed to encourage development designed to provide public access and preserve fragile resources.

(a) Funding of state enforcement programs needs to be considered in terms of an overall management policy and comprehensive plan for the Seabrook/Hampton Harbor area. Such a plan need not be developed as a whole if piecemeal planning follows a comprehensive policy outline. Perhaps regulatory enforcement at the state level can be broken down by area instead of by agency. The single agency acting as a coordinator, as outlined above, might utilize interdepartment personnel more efficiently and economically by eliminating overlapping jurisdictions.

(b) Local government may also provide more effective enforcement of existing ordinances by providing additional funding. Recent legislative action authorizes municipalities to appropriate money for any legal purpose "not prohibited by the laws or by the constitution of [the] state." Chapter 187 of the Laws of 1983, amending RSA 31:4, effective August 10, 1983. Providing adequate funding for local enforcement of building

ordinances may reduce the burden on state agencies by nipping potential problems at the source. If local enforcement can be beefed up, the cost to the state may be reduced and local autonomy preserved. Incentive mechanisms should be considered if the state wishes to promote this type of town action.

(c) Towns are empowered by state statute (RSA 31:3) to acquire real property. The Conservation Commissions are also empowered to acquire property or interests in property for conservation purposes although they do not have eminent domain power. RSA 36-A:4 (amend. 1973). The Town of Seabrook could raise and appropriate money to acquire the remaining back dunes in order to prevent further development. Revenues obtained from property taxes paid by the Public Service Company may allow Seabrook to undertake such a major purchase even without additional state or federal funds. The purchase process may be expedited if the town acts alone. Alternatively, an application to the federal Soil and Water Conservation Fund could provide up to 80 per cent of the necessary funds for such a purchase. Such a purchase would allow the town to gain control of the resource before further damage is done to it.

Other potential sources of state and federal funding include the Coastal Zone Management program (funds limited to planning and research purposes), the Dingell-Johnson Fish Restoration and Management Program administered by the Department of Interior, the National Park Service, and other programs of the Department of the Interior. Funding for the Land and Water Conservation Fund administered by the National

Park Service is assured for the 1984 year. However, general availability of such funds is limited under the present administration.

Other methods of purchasing the dunes might exclude the use of government funding all together. A private conservation trust could be formed to purchase and hold the property, or an established conservation group which buys such tracts may be willing to undertake all or part of the purchase. Tax considerations for an owner who donates all or part of his interest should not be overlooked in the acquisition process.

Purchase of conservation restrictions or development rights may be a feasible alternative to fee simple acquisition. Some tax benefits might be available to the fee owner, and the town would get the results desired. RSA 79-A:15 et. seq., as amended). Other methods of purchasing the land at reduced cost to the taxpayer include a bargain sale to the town with or without a retained life estate by the present owner. This would provide a less expensive means of obtaining ownership and provide tax benefits to the seller or his estate. Internal Revenue Code of 1954 as amended: Subtitle A, Chapter 18, Part VI, Section 170; and Subtitle B, Chapter 11A, Part IV, Sections 2055 and 2106. (1983)

Further research should be conducted to determine the advantages and disadvantages inherent in the various possibilities outlined. The Office of State Planning is presently working on a study, Land Protection Techniques for Communities, to be published during 1984. Of course, the

specific needs of each community will provide a guide to making the best decision.

4. Impact of the Nuclear Power Plant

a. Recreational Facilities

The Rocks Road launch ramp in the Town of Seabrook is presently closed due to construction at the power plant site. Townspeople we talked to understood from Public Service Company that the ramp access would be reopened once construction was completed. A representative of Public Service Company express serious reservations about reopening the access because it is very close to the plant and may raise security problems. If the launch ramp is not reopened the town will be left with only two access points for boaters. The town, in conjunction with the Public Service Company, may wish to consider opening another launch site or upgrading and expanding already existing facilities. If the Public Service Company forecloses use of the Rocks Road site, compensation to the town may be required. This compensation might well take the form of like kind property purchased and dedicated in trust to the town for recreational use.

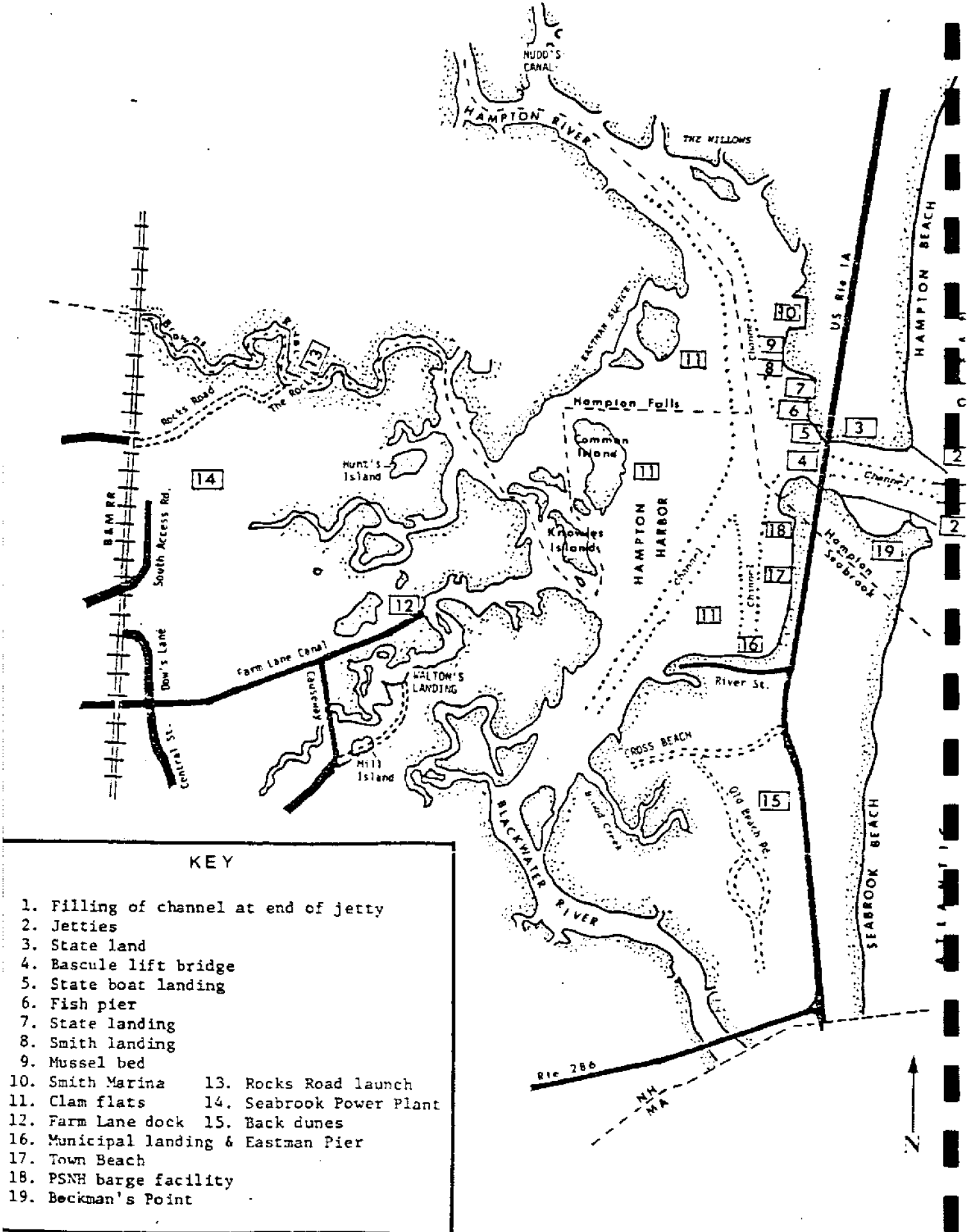
Although the Public Service Company offered the barge facility to the town it is not in a good location for a launch. The Port Authority and Public Service Company have prevailed upon the town to stay demolition of the barge facility for another year but replacing the Rocks Road launch ramp should be considered as a separate issue. Boat access from the west side

of the harbor would be more advantageous for inland residents and would reduce the traffic crush on the eastern side. Whether such a site could be found is another matter. Considerations include wetland preservation and siting the launch ramp at a place where channel depth will allow maximum accessibility for various types of craft.

b. Emergency evacuation planning

Another area of major concern to local residents is the emergency evacuation plan which must be developed to protect residents and visitors in the event of a serious accident at the nuclear power plant. The study authorized by the legislature during the 1983 session will consider this problem. Although Public Service Company contends that there is ample time for evacuation even in a "worst case" accident, present road access would appear to be inadequate to accommodate the volume of traffic which a rapid evacuation would generate. There has been some discussion about building a major north-south highway parallel to Route 1-A along the western side of Hampton Beach. In order to implement such a project compliance with federal laws, and especially the National Environmental Policy Act (NEPA) would be required. Consideration of alternatives, historic preservation, business interests, coastal wetland protection and other environmental impact statement (EIS) criteria could delay such a project for years and perhaps prevent it altogether. Conflicting federal, state, and local interests would inevitably make realization of a major highway

difficult if not impossible. If a major project like this was approved and implemented the entire character of the harbor would be irreparably changed. Provision for adequate evacuation routes is absolutely necessary but care must be taken in evaluating the possible impact on the area resources before siting a major highway through the beach front towns.



Riverine and Estuarine AreasRIVERINE AND ESTUARINE COASTAL RESOURCESIntroduction

For purposes of this chapter we have generalized the description of the resources involved, drawing from observations and interviews with people in a number of different locations along the rivers and estuaries that make up the inland tidal regions, especially those which feed into the Portsmouth Harbor. We have not included in this section those portions of the Piscataqua which are heavily industrialized, preferring to treat them, in-so-far as they are considered, as part of Portsmouth Harbor itself.

Two major initiatives directed toward conservation and access are presently in process in the tidal areas upstream from Portsmouth Harbor. The Great Bay Estuarine Sanctuary nomination is proceeding in tandem with establishment of the Great Bay Estuarine System Conservation Trust. The Sanctuary is proposed under a national program established in 1972 by Congress to protect and manage unique estuarine systems all over the country. The program focuses on public education and research rather than large-scale acquisition and elimination of development. The Office of State Planning has lead responsibility for preparing and following through on this nomination.

The second initiative involves the establishment of watershed associations along the major tributary rivers. The Strafford Regional Planning Commission, under a grant from the federal Coastal Zone Management program has taken the lead in organizing one such

associations, the Lamprey River Watershed Association. A second, in the Cocheco-Isinglass watershed is not yet organized, but may take that step once the proposed Rochester treatment plant comes on line later in the decade. River area planning committees working to establish the associations have done extensive site-specific surveys and developed programs to accomplish purposes closely related to this study. These include (1) development of public access, (2) establishment of priorities among types of potential use, (3) protection of environmentally sensitive resources from inappropriate or overly-intensive use, and (4) search for mechanisms to minimize conflict among users and between the public and private owners. Ms. Francesca Latawiec, planner with the Strafford Regional Planning Commission, has had major responsibility for leadership under the grant.

We have worked with these groups in an advisory capacity and they have kept us informed of their plans and progress.

We have therefore not attempted to identify a specific site for study, but have used the work of river area planning program to help us identify the issues and problems related to access.

Others who have assisted us on this chapter include Sarah James of the Newmarket Planning Office, Kevin Tacy of York Harbor Exports, Inc., John Nelson of New Hampshire Fish and Game Department and Eric Sawtelle of Trout Unlimited.

Description of the Resource

Most of the property bordering tidal rivers and the Great and Little Bays is privately owned. The major exceptions are at Adams

Point on the Great Bay, owned by the State and housing a marine research laboratory for the University of New Hampshire, a sanctuary on Little Bay owned by the Audubon Society and the Pease Air Force Base in Newington owned by the federal government. There is some municipally owned waterfront, usually close to town centers, such as the launch area in Newmarket.

Activities on the privately shorelands are still relatively non-intensive, including residential and farming uses. There is some industrial use, especially where the rivers are or were dammed for purposes of power production in the nineteenth century. These are of course at the upper end of the tidal sections. Industries in the mill buildings are now generally no longer water dependent and most are not even water-enhanced. Their location is determined by the existence of older mill buildings rather than their need for water for power or transportation. Major industries on the Piscataqua in Portsmouth and Newington many of which are in fact water dependant, at least for transportation, are considered in the Portsmouth Harbor section of this report.

The Great Bay itself is relatively shallow with wide tidal flats. This feature has tended to discourage the development of such water-dependant facilities as marinas. The federal government, in the form of Pease Air Force Base in Newington controls a large segment of the waterfront. It may well be that the heavy jet traffic at the air base has discouraged development to some degree in the area surrounding the bay, acting as de-facto protection for the wildlife habitat which is a major feature. The tidal flats and marshes attract migratory birds, waterfowl and game,

are spawning grounds for fish and shellfish, and generally provide an important wildlife resource.

There are a few boat-launch ramps available to the public, mostly upstream from the Great and Little Bays, and the public sometimes gains access to both water and shorelands from rights of way at road bridges.

Until recently the rivers were heavily polluted with industrial waste and sewage. This fact alone has tended to discourage development along the waterfront in the past. The cleanup process is far from complete, but substantial progress has been made. The Water Quality Management Plan for the Piscataqua River and Coastal New Hampshire Basins, prepared by the Water Supply and Pollution Control Commission and published in June 1979, reviews water quality progress in the region and sets goals for continuing efforts. We understand that an update of this plan is being prepared.

The Water Quality Management Plan contains maps of the region and describes the watersheds which contribute to the tidal areas. In New Hampshire there are some thirteen municipalities which border on inland tidal waters. These are Dover, Durham, Exeter, Newmarket, Newfields, Rollinsford, Stratham, Newington, Greenland, and Portsmouth in the Piscataqua River Basin, and Seabrook, Hampton Falls and Hampton in the Seabrook/Hampton estuarine area. See the chapter on Seabrook/Hampton harbor for further discussion of that region.

This chapter will focus on tributaries to the Piscataqua River, although observations about access issues here will apply

elsewhere. Rivers with tidal portions emptying into the Great Bay and the Piscataqua include the Salmon Falls, Cocheco, Bellamy, Oyster, Lamprey, Squamscott and Winnicutt.

Major Interests Identified

Private property owners. Private property owners are a major interest in this entire region. Categories of private property owners include

(a) large, private holdings: a few remain, some as private homes and some as farms;

(b) residential development: including single family subdivisions and more recently condominium and cluster type development.

(c) farms and other agricultural uses;

(d) small business: primarily tourist-related, such as restaurants, marinas, and retail establishments serving water-related recreation such as boat rentals, fishing supply and the like;

(e) industry: usually located in town centers such as Dover and Newmarket at the point where the rivers are dammed and therefore cease to be tidal. They make use of existing mill buildings, although they no longer use the water power for which the dams were created;

(f) aquaculture: fish ranching and oyster farming enterprises.

Local, state and federal government.

The State of New Hampshire has a broad public interest, exercised through various departments including Fish & Game, Wetlands Board, Water Supply & Pollution Control, Department of Resources and Economic Development and others.

The Wetlands Board, established under the Water Resources Board and incorporating representatives from several state agencies and the public, has jurisdiction over dredge and fill in wetlands and over activities which involve docks or other structures in navigable waters. (RSA 482 and 483-A). The Governor and Council have the final authority over activities in public waters, although they do not have direct jurisdiction over activities in wetlands.

The University of New Hampshire, through its Jackson Laboratory on Adams Point, emphasizes research on marine and estuarine matters, and thus has a major stake in the maintenance of water quality and habitat in the estuary.

Municipal governments. Municipalities own some shore property, usually near town centers and used for boat launching, fishing and other recreational activities. In some cases, municipalities use shore-front property for purposes which are not only unrelated to the waterfront, but which actually detract from its attractiveness and interfere unnecessarily with public access. Examples are parking lots, public works garages, and landfills. Now as the water itself is cleaned up, municipalities will need to reassess their use of such property.

Cities and towns have an economic interest in development of the shoreline. As pollution sources come under control, pressure to

subdivide property for residential or commercial purposes will increase, adding to the tax base and also to the demands for municipal services. This same development pressure will tend to reduce opportunities for public access while at the same time increasing demand.

Local conservation commissions have a role in responding to proposals for dredge and fill permits in wetlands before the State Wetlands Board. (See RSA 483-A). They also may recommend municipal ordinances to protect wetlands and may be given responsibility for assisting other local boards in administering them. Parks and recreation commissions also have a role in managing town-owned property and planning for public access to waterways and wetlands for recreational purposes. Road agents must maintain access roads and may be responsible for some waterfront facilities such as launch ramps and parking areas.

Federal government. The United States Government, with its military facility at Pease Air Force Base in Newington, has a major role, but does not seem to represent an important interest in so far as use of the coastal resources themselves is concerned. It can be assumed that Base personnel become part of the general public when recreational interests are considered.

The Army Corps of Engineers has responsibility for controlling dredge and fill activities in navigable waters through the Rivers and Harbors Act, Section 10 and Section 208 of the Water Pollution Control Act.

Private, non-profit organizations. Private organizations fall into two categories, those which actually own land and those

which do not. The Audubon Society of New Hampshire owns a small sanctuary on the Little Bay. The Society for the Protection of New Hampshire Forests may hold some easements.

The sportsman's groups represent the majority of non-land holding organizations. Ducks Unlimited, Salmon Unlimited and other groups in the New Hampshire Wildlife Federation have taken an active interest in preserving habitat and access for hunting and fishing.

The general public, especially recreational interests.

Recreational interests, not always compatible, range from relatively passive enjoyment of the coastal area to more active pursuits such as fishing, canoeing, power boating, picnicking and camping, swimming, hiking, cross-country skiing and trail-biking. While some are represented by organizations, many are not. Their needs and interests are diverse, and they have no direct means of being held accountable for activities which may interfere with others or damaging to the resources.

Areas of Conflict and Competition for the Same Resources

As might be expected, the public is often its own worst enemy. Littering, noise, and property destruction are common complaints among private property owners whose land is used by the public or who abut public recreational property. These experiences lead private property owners to resist efforts to develop shorefront access on their property, such as easements for hiking trails.

The more access is closed off or compressed into smaller space, the greater the problems of litter, crowding, parking,

traffic and conflict among users in those areas where access remains available.

Private property owners do not always welcome hunters, and of course passive recreation such as hiking, bird-watching and the like are severely restricted during hunting season in areas where game is plentiful.

Recreational fishermen, canoeists and swimmers object to high-speed boating and water-skiing in river channels. These kinds of activities also disrupt wild-life habitat in some areas and cause erosion along the shoreline.

Industrial and commercial users experience some difficulties with the general public's use of their water access for recreational purposes such as boat-launching, swimming and picnicking.

Concern for habitat maintenance collides with development pressure, especially where dredging and filling are proposed in wetlands or estuarine bottoms. Development of course interferes with hunting interests where homeowners object to the use of guns near dwellings and trespassing on private property by hunters and other sportsmen.

Major Issues Identified.

Pollution Control. Despite important progress in the last decade, pollution problems persist. Although this study does not address upstream sites, it cannot ignore the fact that pollution travels downstream, and inadequate pollution controls above the tidal point affect the tidal areas.

Point Sources. Most industrial point source pollution has been brought under control through the National Pollution Discharge

Elimination System (NPDES) federal Water Pollution Control Act administered jointly by the New Hampshire Water Supply and Pollution Control Commission and the Environmental Protection Agency. It can be assumed that policing of permit conditions is weak here as it is in other areas. Nevertheless, industrial point discharges were not identified as a major problem.

Industrial spills, although infrequent, can be catastrophic and are a constant source of anxiety for wildlife management as well as for recreational interests and the fish-farming industry. The oyster-farming project has on more than one occasion been severely affected, and damages have been insufficient to cover real long-term losses according to the proprietor.

Municipal sewage remains a significant problem, especially on the Cocheco flowing from cities such as Rochester which have not yet completed sewage treatment facilities adequate to deal with the sewage collected.

Non-Point Sources. Non-point pollution sources are by definition more difficult to pin-point and of course harder to control. Major contributors to non-point source pollution include agriculture and forestry practices which cause siltation and run-off of pesticides and high-nutrient fertilizers; septic systems which also contribute nutrients; municipal and private landfills which may leach chemicals, heavy metals and nutrients; road salt; dredge and fill in wetlands; leaking underground fuel tanks; sand and gravel excavation; and runoff from roads and parking lots. Withdrawal of federal support for non-point source control, and lack of state resources to fill the gap, have left many unanswered questions about

pollution from non-point sources and how best to control it.

Power boating. Despite state laws and regulations purporting to control the speed and wake of power boats, power boating was a frequent source of complaint. Municipalities do not have jurisdiction on state-owned waterways and cannot police them. The State has few enforcement personnel devoted to policing this kind of activity. The channels are narrow except for the Great Bay itself, and even there, at low tide especially, access is very limited for power boats. Canoeists, fishermen, swimmers, and wildlife management personnel especially emphasized the adverse effects of power boating (and water skiing) on other activities.

Public access and private property. There is major resistance by private property owners to public access across or adjacent to private property along the waterfront. Picnickers, swimmers, boaters and hikers leave trails of trash, from bottles to used pampers, and incidents of vandalism are reported. Parking is a problem and cars either encroach upon the roadway or on private property.

Development and wildlife habitat. Housing and other building development inevitably diminish the range of wildlife. In coastal areas, developers often seeks to take advantage of a waterfront location by dredging or filling wetlands to increase buildable area or provide access to the water.

Proposals and Recommendations

A. The private sector.

1. The land trust concept should be embraced by all interests because of its flexibility and independence from domination by other institutions, private or governmental. The land trust can actually own land; it can hold easements for particular purposes, leaving the underlying fee interest in private hands; it can purchase land or accept donations; it can develop land where appropriate and protect it to whatever degree is deemed necessary; it can manage land to further the purposes of the trust. The Great Bay Estuarine Trust, now in the process of organization, can be expanded to accommodate tidal lands tributary to the Bay and upstream areas could also be included.

Membership in the land trust is voluntary, and can include those who actually own riparian land and those who do not. It provides a vehicle to protect both landowner and non-landowner interests without the wider political pressures involved in state ownership or control.

Donations of land or interests in land to the trust may have favorable federal tax ramifications for the donor under Section 170 of the Internal Revenue Code. Donation or partial donation of conservation restrictions or development rights will assure that land is eligible for current use assessment treatment for municipal property tax purposes under the state law, RSA 79-A.

2. The various sportmen's and other organizations using the area should consider setting up an umbrella organization to bring

different interests together in an ongoing planning and implementation effort. The River Area Planning Councils initiated by the Strafford Regional Commission could serve as models.

B. The Public Sector.

3. Municipalities should work together to adopt compatible zoning provisions and subdivision regulations along the shorefront. These should direct water-dependent and water-related activities to that area, and discourage those which derive no benefit from proximity to the shore. They should protect sensitive areas from encroachment and provide for public access where appropriate.

Local wetlands overlay ordinances can be developed to prevent building activity in wildlife habitat. Prime wetlands can be designated under the State wetlands protection act (RSA 483-A) to restrict state permits for activities in wetlands.

Cluster zoning provisions can be developed to encourage preservation of open space along the water front and prevent non-point source pollution from septic systems and run-off.

4. Municipalities should survey their holdings in shorefront areas to determine how best to use them in the public interest. Some should perhaps be sold to private developers who can use them appropriately without destroying their public value. In such cases it may be advisable for the municipality to retain an easement for limited public purposes. Other municipal holdings, now used for activities that are in no way benefited by proximity to the shoreline, might be developed to provide public access. Still others should be preserved or improved for protection of habitat,

water quality and enhancement of aesthetic appeal.

5. Historic preservation considerations should not be ignored in developing plans for preserving the shoreland areas. Dams, millsites, residential and commercial buildings, and so forth provide an important link with the past and add to the attractiveness and character of the area. There are important federal tax advantages to be gained from proper rehabilitation of existing buildings and preservation of historic sites.

6. Motor boating in areas of wildlife habitat and where others swim or canoe was mentioned frequently as a problem. Only the state can control this activity which takes place in public waters. Pressure should be brought on state agencies to set clearer standards for power boats and to see that they are enforced. Penalties for illegal or dangerous boating activities will need to be stiffened. Personnel associated with the land trust or other organization holding an interest in riparian property should take responsibility for reporting boating violations, but the state agency, the Department of Safety, has the ultimate authority. (RSA 270) The division responsible for boating safety is woefully undermanned in the field. If the state cannot provide more manpower, it should explore ways to use others, both private persons and state personnel, to improve policing capability.

C. Public-private cooperation and alternatives.

7. Methods of limiting public access to appropriate purposes should be developed and enforced. In some areas seasonal restrictions should be considered. For example, off-road vehicles and horses may not be acceptable on trails designed for hiking. If

both activities can be accommodated at some times of year, they might be limited at inappropriate seasons, such as periods when the soil is especially wet or muddy. It may be advisable to place certain areas off-limits to the public during wildlife breeding seasons. Some areas may be open only to particular groups of users in any given season.

8. Policing is a problem here as in all the areas we studied. Mechanisms to provide for self-enforcement and to encourage compliance with reasonable regulation of activities must be worked out at both state and local levels. State agencies need to share personnel in the field, and municipal agencies need to be brought into the enforcement picture to provide a cooperative, broad based policing system.

9. The question of funding for policing access must be faced. A land trust should seek endowments with the land or interests it holds to provide for ongoing oversight. A fee system could be instituted in some areas, such as boat launches and trails, to provide funds for maintenance. If the state were to hold the property interests, it would be important to make certain that any fees were dedicated to that purpose and not diverted to the general fund. Sportsmen's clubs might assess their members who use the area for hunting and fishing.

Whatever mechanisms for funding are finally chosen, they must be carefully worked out to provide adequate support for the access program over the long term. Where donations of interests in land are made, and federal tax deductions sought, it is essential that the policing program be acceptable to the federal Internal Revenue

Service. This is somewhat complicated by the fact that IRS has yet to adopt rules under the relevant section of the Code.

10. Liability is an ever-present concern, especially for municipalities and private individuals who make some charge for use of their land. The legislature has acted to protect property owners who permit recreational use of their land without charge (RSA 212:34, 508:14; 216-F:3). But municipalities, since the abolition of sovereign immunity in New Hampshire (see section on Municipal Liability) are coming increasingly under threat of suit and are understandably uneasy. Private, non-profit organizations which maintain property for public or quasi-public purposes must also consider the liability issue. Fear of liability is frequently used as a reason for towns and private groups to decide against maintenance of public access facilities. Some changes in the legislation should be explored to lower the risk of liability for all groups, public and private, if public access is to be maintained along the shorefront.

11. The New Jersey Conservation Foundation has proposed a system based on the English "Countryside Commission." It merits closer examination to see if it may be adaptable to the New Hampshire situation. The New Jersey proposal "not only expands recreational facilities by financially rewarding landowners who allow some access to their land for hiking, camping, swimming and picnicking, but also shifts responsibility for these sites to a local warden."¹ (New Jersey Conservation Foundation, An Open Lands Management Program for New Jersey, January 1983.) "The Countryside Commission believes that channeling hikers, campers and other

visitors into designated trails, picnic spots and campgrounds goes a long way towards easing existing problems. Rather than buy up necessary land and run these many facilities on its own, the Countryside Commission instead seeks wherever possible to encourage private farmers and landowners to allow access across their land for trails and also to develop for-profit campsites and snack bars.

"Not only are the farmers paid for allowing trails, but a local warden with a great deal of autonomy then takes responsibility for setting up the hiking paths and maintaining. Each farmer has an individual contract with the Commission, usually for one or two years' duration, specifying where access can take place and freeing the farmer of liability."

New Hampshire law enables the state to set up a system of trails including outright purchase in fee and acquisition of limited property interests (RSA 216-F). This statute could be used as a basis for the kind of undertaking envisioned by the Countryside Commission proposal.

MUNICIPAL LIABILITY ON THE WATERFRONT

by Kristin Johnson

Carolyn W. Baldwin, Supervisor

Introduction

The availability of public lands for recreational purposes concerns many people for many reasons. To some, public parks and wilderness areas are the last bastion of open country once freely accessible to all. To others, city parks and swimming areas are the only respite from the jungle of urban pavement, glass, and steel. Unfortunately, the important part these areas play in the human environment is often taken for granted by the people who use them. Today, the availability of public recreational areas, their maintenance and upkeep, and the fact that they are open at all depends heavily on public policy and specific legal actions taken to ensure their continued accessibility.

In recent years one particular legal development has perplexed state policy makers and the local governing bodies who are concerned about potential liability and the attendant financial burdens arising from the use of public recreational lands; the state courts have been whittling away at the doctrine of sovereign immunity. This paper will outline the decline of the doctrine in the State of New Hampshire and explore the present ramifications and possible future impact of this trend on the acquisition and use of public lands for recreational purposes. Although the decline of the sovereign immunity doctrine affects all public lands used for recreational purposes, it is felt

first and most keenly at the municipal level. This paper will focus on municipal waterfront land as a specific example of how recent changes in the law may effect local land use policy.

Sovereign Immunity

Throughout most of the history of Anglo-American jurisprudence, states and municipalities have been immune from tort liability. The doctrine is based on the common law theory that the sovereign, ie: the king, could not be sued without his consent. The doctrine has since been applied to our republican form of government and was adopted by the New Hampshire courts as early as 1821. Farnum v Manchester 2 NH 392. Although the doctrine was originally developed by the courts, the legislature has both adopted and limited it through the enactment of various statutes. In recent years the New Hampshire Supreme Court has severely curtailed the use of the doctrine. A brief discussion of these developments follows.

After a long series of decisions curtailing the doctrine's application at the municipal level, in 1983 the Supreme Court pierced the immunity of the state itself. In State v Brosseau, No. 82-064 & c., Slip Opinion of December 1, 1983 [123 N.H. ___, 467 A.2d ___ (1983)] the New Hampshire Supreme Court warned that the state legislature should reconsider the "present procedural and financial inadequacies of statutes relating to sovereign immunity." Brosseau, Slip Op. at 6. The Court, with a two of five majority and special concurrence from Justices Douglas and Batchelder, stopped short of declaring the doctrine of sovereign

immunity unconstitutional as it appears in NH RSA 99-D:1 (Supp. 1981).¹ The concurring opinion was strongly worded and noted that the doctrine "is unconstitutionally broad in its present statutory form." Brosseau, Slip op. at 7.

The Brosseau decision has been hailed as the death knell of the state sovereign immunity doctrine. However, the holding in Brosseau is limited to negligence claims brought under two statutes, RSA 135-B and RSA 171-A. A right to adequate and humane treatment vests in every involuntarily committed mental patient under RSA 135-B and in every developmentally impaired client treated by the state Division of Mental Health under RSA 171-A. In Brosseau, the court found that the New Hampshire legislature had created a statutory right to adequate and humane treatment, and a corresponding duty owed by the state, through its agents, to provide that care. Breach of the statutorily imposed duty in the Brosseau cases created a cause of action in tort for damages. Brosseau Slip op. at 5.

Actions brought against the state which are not based on statutorily imposed duties may still be dismissed based on the doctrine of sovereign immunity. Judicial abrogation of the broad immunity to suit, as it is presently legislated under RSA 99-D:1, is likely only if the legislature does not act to narrow that statute's scope and increase the limits on recovery for actions brought before the State Board of Claims under RSA 541-B:12 (Supp. 1981). The emphasis on personal injury recovery is at the crux of the Court's opinion in Brosseau. The state's liability for injuries sustained by persons using state lands for

recreational purposes and how the holding in Brosseau might be applied to an action in tort for damages arising from such an injury are left for another day.

Municipal Liability: The Abrogation of Sovereign Immunity

Although the Brosseau decision is a major step in limiting the sovereign immunity doctrine at the state level, both the legislature and the Court have limited its application to local governments for nearly a century and a half. In 1842 the legislature created liability for towns for failure to properly warn of danger or defects on bridges, culverts, sluiceways, or dangerous embankments (See RSA 231:92 (1981)) and roads (RSA 231:91). In 1854 the legislature passed an act imposing liability for mob damage done to private property in any town where persons have riotously assembled. (See RSA 31:53, still on the books). For a time prior to 1893, state statutes made municipalities liable for any defects in any part of a highway. Wilder v Concord, 72 N.H. 259. Other statutory limits followed. Finally, in 1961 the legislature passed RSA 412:3 which disallowed the defense of governmental immunity where insurance had been purchased to cover a risk up to the limits of the coverage purchased.

The New Hampshire Supreme Court began to distinguish between governmental and proprietary functions of municipalities several decades ago. Reynolds v Nashua, 93 N.H. 28 (1943) held liability could be imposed where a municipality acted like a private business rather than carrying out government functions;

Kardulas v Dover, 99 N.H. 359 (1955) held that a hospital operated by the City of Dover was not a governmental function and was liable for negligent conduct; Allen v Hampton 107 N.H. 377 (1966) held the town liable for negligent maintenance of a municipal drainage system which resulted in extensive damage to a property owner. Liability was imposed when the act was determined to be proprietary and not when it was governmental. The distinction, however was often blurred. Gossler v Manchester, 107 N.H. 310 (1966), Kennison, J. dissenting.

Effective July 1, 1975, in the case of Merrill v City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974), the New Hampshire Supreme Court abolished sovereign immunity for New Hampshire municipalities. In Merrill, the New Hampshire Supreme Court prospectively abrogated the common law tort immunity of cities and towns and invited the legislature to specify the terms and conditions of suits against cities and towns, to limit the amount of recovery, or to take any action in its wisdom it might deem proper. The legislature responded in 1975 by enacting RSA 507-B pertaining to bodily injury actions against governmental units. In 1981 RSA 507-B was amended to include personal injury and property damage. Under RSA 507-B:2:

A governmental unit may be held liable for damages in an action to recover for bodily injury, personal injury or property damage caused by its fault or by fault attributable to it, arising out of ownership, occupation, maintenance, or operation of the following:

I. All premises, except public sidewalks streets highways or publicly owned airport runways and taxiways.

II. All motor vehicles.

A governmental unit as defined in RSA 507-B:1 includes counties, cities, towns, and other corporate and political subdivisions within the state. It does not include the state or any state agency or department. The exclusions noted in RSA 507-B:2 are covered elsewhere in the statutes.²

As amended in 1981, RSA 507-B establishes liability for bodily injury, personal injury or property damage sustained on municipal premises where fault and causation can be shown, with some exceptions. The abolition of sub-state governmental immunity is subject to two exceptions: for acts and omissions constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an executive or planning function involving the making of a basic policy decision characterized by the exercise of a high degree of official judgment or discretion. Merrill, 114 N.H. at 729-30. The concurrence in the recent Brosseau decision noted that these two exceptions should also be retained when the legislature reconsiders the sovereign immunity doctrine as applied to State government.

Municipal Waterfront Liability

Who is liable for physical injuries and property damage when accidents occur on municipal property? The answer to this question, for public areas which abut the water, depends on how the "area" is characterized. If the land is a public recreation area or park, the municipality may be held liable under RSA 507-B. On the other hand, if the area is merely an access point for launching boats at the end of a road, the municipality may be

held liable only under certain circumstances set forth in Chapters 230 and 231 of the New Hampshire statutes. These two types of liability and the legislation which controls them will be discussed separately.

I. Recreational Areas

An area developed and maintained by a municipality for recreational use on the waterfront is analogous to a public park or playground. New Hampshire case law dealing with municipal liability for injuries received by an individual while using a park or recreation area is sparse. The most recent case is Cargill v. City of Rochester 119 NH 662, 406 A2d 704 (1979) which deals with the change in the law embodied in Merrill v. Manchester and the 1975 version of RSA 507-B. Cargill will be discussed in more detail below.

Earlier cases involving injuries sustained in connection with municipal recreational facilities held that "in the absence of a statute creating the liability, no action can be maintained against a municipal corporation for an injury arising from the neglect of a public corporate duty, from the performance of which the corporation receives no special benefit, pecuniary or otherwise." Piasecny v. Manchester 82 N.H. 458, 136 A. 357 (1926) and Harkinson v. Manchester, 90 N.H. 554, 5 A2d 721 (1939). These cases would not be decided the same way under the new statute and case law abolishing sovereign immunity as set out in Merrill v. Manchester.

A waterside recreational area should fall under the general

term of "all premises" as used in subdivision one of RSA 507-B:2, I. This statute entitled, "Liability for Negligence", specifically includes operation and maintenance of all premises. In the event of an injury, the injured party might bring an action alleging that the municipality was negligent in the operation and maintenance of the recreational area. An important point to note is that an injured person must first prove that the municipality had a duty of care toward him in the particular circumstance where the person was injured. The complaining party must show that: (1) there was such a duty owed to him; (2) that the municipality breached its duty in some way for which it can be held liable, and; (3) that the breach was the proximate cause of the injury. Nolan, Tort Law, s 171 (1979). Only by thus establishing duty of care, damage, fault, and causation can the injured party succeed in an action under RSA 507-B.

RSA 507-B:4 as amended in 1981 raised the limit on municipal liability to \$100,000 for all damages sustained by any one person arising from a single occurrence in an action brought against a governmental unit. (The limit set in 1975 was \$50,000.) The earlier limit was enforced, with reservation, in the case of Cargill v. City of Rochester, 119 N.H.662, 406 A2d 704 (1979). In that case, two boys, ages ten and twelve years, were playing near an indoor swimming pool owned and operated by the City of Rochester. The two youths entered an unlocked storage shed on city property; when one boy lit a match, a drum of methanol exploded. One boy died and the other suffered severe burns. In 1975, the surviving youth and the estate of the deceased filed

actions in negligence and strict liability against the City of Rochester seeking damages of several million dollars in each case. The City of Rochester invoked the \$50,000 limit and the plaintiffs attacked the constitutionality of the limit. The Court upheld the limit, but stated that the \$50,000 limit was "precariously close to the boundary of acceptability." Id at 708. This warning prompted the New Hampshire legislature to increase the limit to \$100,000.

The opinion by Justice Lampron in the case of Merrill v. Manchester, supra, clearly states that the common law immunity of cities and towns was abolished, subject to certain exceptions relating to governmental discretion. If the rationale of Merrill is applied to a hypothetical case in which a youth is injured while playing, fishing or swimming at a city owned and maintained waterside park, it appears that the city would be subject to a suit. However, actual liability would turn on whether or not the injury was caused by a fault of the city, or by a fault attributable to it. Liability under RSA 507-B:2 does not automatically follow an injury; negligence and causation must be proved, as set out above.

A. Insurance

A municipality concerned with the potential economic burden of a \$100,000 judgment obtained against it by a successful plaintiff in a RSA 507-B suit, may purchase insurance to alleviate that concern. The \$100,000 liability limit set by RSA 507-B:4 is qualified by RSA 412:3 which allows a municipality to

purchase insurance to cover the risk of liability created by RSA 507-B. RSA 412:3 qualifies the RSA 507-B:4 liability limit by allowing recovery to the amount of insurance purchased or the \$100,000 limit, whichever is higher. The municipality may find that it can reasonably afford to pay a yearly insurance premium on at least a portion of the potential \$100,000 judgement, and thus could keep its recreational area open rather than close the area out of fear that it will be burdened with an unmanageable bill. Discussions with insurance professionals indicate that the premiums are relatively modest for this type of coverage.

RSA 412:3 was applied in Brown v. City of Laconia, 118 N.H. 376, 386 A.2d 1276 (1978). The plaintiff brought suit against the city to recover for property damage and personal injuries which resulted from an automobile accident. The plaintiff claimed that the city negligently allowed a known, slippery, hazardous condition to remain by failing to remove ice and snow. The city's insurance company denied coverage and the city pleaded governmental immunity. The court held that a city loses its governmental immunity up to the limit of insurance coverage on any risk insured against. Brown, 118 N.H. at 378. The Court found that the policy was purchased with a specific clause including the hazard of snow removal and that the policy did cover the plaintiff's claim. Id. at 378, 379.

II. "End-of-the-Road" Launch Sites

In addition to waterfront recreation areas there are a number of boat launching sites at the end of municipal roads.

These sites may fall under the New Hampshire Statutes covering roads and highways if they are characterized as mere extensions of the road itself. NH RSA Chapter 230 covers state highways and RSA Chapter 231 covers municipal roads. Three categories of end-of-the-road launch sites can be distinguished from the statutes. Liability will be different in each case.

A. Lay Out of Highways to Public Waters: RSA 230:63-71 (1981)

The Governor and his advisory council are empowered to lay out highways to public waters other than waters used as reservoirs by a municipality. RSA 230:69. Under present law neither the town nor the state can be held liable for "any injury to person or property on any highway laid out under the provisions of this subdivision, nor shall any indictment or information be maintained against any town on account of the condition of any such highway." RSA 230:71. The effect of the Brosseau decision on this statutory immunity from suit is not clear. In this instance the state is performing a function unique to its position as sovereign in laying out such highways. However, the municipality is required to maintain the road under RSA 230:70, although no liability attaches for failure to do so.

Under the Brosseau analysis, failure of the town to maintain the road may give rise to a cause of action for negligence if the road is not specifically made subject to gates and bars under RSA 230:68. If the road is open to vehicular traffic to a launch site then it is questionable whether a motion to dismiss based on statutory immunity or a defense based on the

gates and bars theory would prevail. The analysis in Brosseau may require the town to submit to suit under the implied waiver of immunity theory arising from the town's statutory duty to maintain the road.

B. Class VI Highways: RSA 229:5-VII and RSA 231:50 (1981)

Class VI roads are those which have been declared "discontinued as open highways and made subject to gates and bars" by vote at town meeting, or roads not maintained for at least five years. RSA 229:5-VII; RSA 231:44. A public launch area at the end of a Class VI road seems unlikely. A Class VI road is a public way which a municipality is not obligated to maintain, nor is it liable for failure to do so. RSA 231:50.

For a town to permit a launch area at such a location would imply an expectation that the road would be used and bring into question the road's Class VI status or the applicability of the immunity statute. See Bancroft v Town of Canterbury 118 N.H. 453 (1978) where plaintiff was injured at a barrier to a discontinued bridge. The Court said: "we do not believe that [the statute] was intended to be a license for towns to construct or maintain barriers... in a manner which invites peril." Id. at 457.

C. Other Municipal Roads

A municipal road ending in a launch site and not covered by the statutes discussed in parts A and B above falls under a variety of other statutes in Chapter 231. The immunity from suit

legislated under RSA 230:71, for highways laid out to public waters by the Governor and council does not apply to highways similarly laid out to public waters by the mayor or selectmen of a municipality under RSA 231:6. Towns are liable for damages sustained by travelers on town bridges, culverts, sluiceways, or dangerous embankments where insufficient warnings are given or maintenance has been neglected. RSA 231:91, RSA 231:92. If the town does not maintain their highways when they have a duty to do so they may also be fined for neglect under RSA 231:82. (The penalty does not apply to Class VI highways mentioned above)

However, towns are not liable for damages sustained on Class I, state maintained Class II, Class III, or jointly funded Class V highways, except when the town neglects to maintain their portion of a jointly funded road. RSA 231:93. Until Brosseau the state was not amenable to suit for damages other than damages for taking, relocation, or destruction of property under RSA 230:21-43 (1981). The statutory duties imposed on the state for maintenance of the highways under RSA 230:1-7 might now give rise to a cause of action for damages sustained by travelers due to the state's negligence in maintaining the highways.

Other sections of RSA Chapter 231 further limit the liability of the municipalities with regard to injuries sustained by travelers. (see RSA 231:90, Duty of Town After Notice of insufficiency; RSA 231:91, Town to Act; Liability; RSA 231:96, Weight of Load; RSA 231:97, Width of Felloes; RSA 231:98, Drovers of Cattle; RSA 231:99, Speed Limit; RSA 231:109, Liability of Persons for Damages on Bridges, Culverts, and Embankments.)

Conclusion

It is likely that municipalities will be held liable for injuries and damages sustained at publicly owned recreation areas if the injured party can prove that the injury was caused by the municipality's fault. RSA 507-B: section 2-a does insure that municipalities are immune from suits brought for accidents which occurred due to bad weather. This is certainly a major cause of waterfront accidents but unfortunately not the only one. The municipality should buy insurance to cover the type of suits allowed under RSA 507-B.

Otherwise, maintenance of launch areas should be undertaken in conformance with RSA Chapter 231, and towns may still be able to take advantage of RSA 230:69, et. seq. and avoid liability by having the Governor and Council lay out the road. However, where a town has a Class VI road ending at a launch site or a road laid out to a public water by the Governor and Council, they may not be able to avoid liability after the Brosseau decision. Hopefully the legislature will act quickly to rewrite the offending statutes noted by the court in Brosseau. At the same time they must carefully consider the impact of the Court's construction of the sovereign immunity doctrine and act so as to avoid an unreasonable burden on state coffers while meeting the Court's concerns.

Both the state and the towns seeking protection from potential liability may wish to purchase insurance. No litigation based on injuries sustained at a town waterfront has cropped up

since these statutes were enacted and no determination has been made as to which statutes would cover an end of the road launch. Additional liability questions posed by Brosseau should prompt municipalities to purchase insurance coverage if they have not already done so. The public interest should encourage keeping recreational areas open and at the same time protecting municipalities from potentially unmanageable economic burdens.

FOOTNOTES

1. NH RSA Chapter 99-D "Defense and Indemnification of State Officers and Employees"

RSA 99-D:1 (Supp. 1981) sets forth the statement of policy:

It is the intent of this chapter to protect state officers, trustees, officials and employees who are subject to claims and civil actions arising from acts committed within the scope of their official duty while in the course of their employment for the state. It is not intended to create a new remedy for injured persons, to waive the state's sovereign immunity, or to waive the sovereign immunity of the state which is extended by law to state officers, trustees, officials or employees. The doctrine of sovereign immunity of the state, and the extension of that doctrine to officers, trustees, officials or employees of the state or any agency thereof acting within the scope of official duty and not in a wanton or reckless manner, except as otherwise provided by statute, is hereby adopted as the law of the state.

In addition "Defense and Indemnification of County Officers and Employees" is regulated by RSA 29-A (1983).

2. NH RSA Chapter 231 "Cities, Towns and Village District Highways"

Municipal liability for "Neglect of Highways" is set forth in Chapter 231 beginning at RSA 231:82.

RSA 231:82, Penalty for Neglect
RSA 231:84, Fine
RSA 231:88, Payment of Damages to Landowner
RSA 231:90, Duty of Town After Notice of
Insufficiency
RSA 231:91, Town to Act; Liability

"Liability of Towns" is set forth in Chapter 231 from RSA 231:92 through RSA 231:110 and liability for sidewalk "repair and Maintenance" is set forth at RSA 231:113.

Publicly owned airport runways and taxiways are regulated under NH RSA Chapter 422 and all government units are exempt from liability under RSA 422:17 "Suits Affecting Air Navigation Facilities". Motor vehicle liability is regulated under the Motor Vehicle Financial Liability Act and insurance for state owned vehicles was formerly governed by RSA 8:19, IX until its repeal in 1983.

NEW HAMPSHIRE TIDELANDS: OWNERSHIP, RIGHTS AND LIMITATIONS

by Kristin Johnson

Carolyn W. Baldwin, Supervisor

I. Introduction

A long standing controversy over who holds title in fee simple to the narrow strip of New Hampshire land between high and low tide, called intertidal lands or foreshore, has never been adequately settled. Although this bit of property law was hotly debated during the 1800's when New Hampshire coastal communities began to grow, it has not been an active issue since that time. It may again become an issue as population pressures increase in communities bordering on tidal waters.

A hundred years ago the New Hampshire courts heard cases concerning public rights of way and trespass quare clausum fregit brought by coastal inhabitants against one another. These early settlers were as much dependent on the salt marsh hay which fed their cattle and the seaweed which fertilized their farm lands as they were on fishing. Farmers who did not own land abutting the sea relied on the saltmarsh commons and made it a regular practice to cross private lands to get to the tidelands where they gathered seaweed. Here the conflicts arose and were settled, but the courts' decisions were not always consistent.

As primitive agricultural practices gave way to more efficient methods of farming and then to industrial development

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during the late 19th and early 20th centuries, disputes over tidal ownership and access died down. Today, as New Hampshire's tiny coast becomes increasingly populous, divergent interests are once again in conflict and the forgotten question of tidelands ownership needs to be resolved.

II. The Controversy

A. English Law and the Massachusetts Ordinances of 1641 and 1647.

For centuries the New Hampshire courts have been torn between the English law relating to tidelands which left title in the sovereign and the Massachusetts Ordinance which granted title to private owners. New Hampshire was governed by Massachusetts from 1647 to 1679 and again from 1690 to 1692. This short period of unified rule was long enough to result in 300 years of unsettled law with regards to who owns the area between high and low tide. Therefore reference must be made to the Massachusetts Ordinances of 1641 and 1647, in order to make intelligible the later decisions of the New Hampshire courts.

In 1641 the Colony of Massachusetts Bay, which did not include New Hampshire, made the following provision in its Body of Liberties:

Every Inhabitant that is an howse holder shall have free fishing and fowling in any great ponds and bayes, coves and rivers, so farre as the sea ebbes and flowes within the presincts of the towne where they dwell, unlesse the free men of the same towne or the Generall Court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others proprietie without there leave. Colonial Laws of Massachusetts. (Whitmore's Ed. of 1889) at 37, No. 16.

The 1641 Massachusetts Body of Liberties is reprinted in 1 Laws of New Hampshire, Appendix D (1904) and in the opinion of the editor, was "made operative by colonial legislation in New Hampshire as well as in Massachusetts Bay." 1 Laws of New Hampshire at 748.

In 1647 the provision quoted above was amplified and amended by the General Court of Massachusetts Bay as follows:

Every Inhabitant who is an householder shall have free fishing and fowling in any great ponds, bayes, coves and rivers, so farr as the sea ebbs and flowes, within the precincts of the towne where they dwell, unless the freemen of the same towne or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great pond containing more than ten acres of land, and that no man shall come upon anothers propriety without their leave otherwise then as hereafter expressed. The which clearly to determine; It is declared, that in all creeks, coves and other places, about and upon salt-water, where the sea ebbs and flowes, the proprietor of the land adjoining, shall have propriety to the low-water-mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels, in or through any sea, creeks or coves, to other mens houses or lands. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowle there, and may pass and repass on foot through any mans propriety for that end, so they trespass not upon any mans corn or meddow. Colonial Laws of Massachusetts. (Whitmore's Ed. of 1889) at 170 (emphasis added).

B. The New Hampshire Aberation

In both Maine and Massachusetts the Bay Colony Ordinance as amended and actually adopted in 1647 is still part of the common law. One part of the Ordinance which is still good law in

those jurisdictions is that the private land owner has title in fee simple to the low water mark or 100 rods out (whichever is shorter). Although New Hampshire was partially within the territory governed by the Colony until the first New Hampshire General Assembly in 1679, the Colonial Ordinance was not specifically incorporated into the first enactment of New Hampshire laws. See 1 Laws of New Hampshire. This lack of legislative specificity has led the New Hampshire Supreme Court to take contradictory positions with regard to ownership of the foreshore.

The Early Cases: Perley, Nudd, and Knowles

The cases which address the question of New Hampshire's incorporation of the Ordinance into the laws of the province are ambiguous. The problem is compounded by the New Hampshire Supreme Court's attempt to define rights acquired by custom and prescription under common law. The following cases illustrate these problems.

1. The Perley Case

The earliest case which distinguished waterfront rights acquired by custom and prescription was Perley v. Langley, 7 NH 233 (1834). The Perley case distinguished between rights "holden as a custom" and those "holden as a prescription" where the plaintiff sued the defendant for breaking and entering the plaintiff's close and removing earth from the plaintiff's land. Perley v. Langley, 7 NH at 235. The defendant pleaded in justification that he had a right to do so by custom since the town folk had done the same since time immemorial. The Court

finding for the plaintiff held that rights a prendre,¹ in alieno solo, cannot be sustained as part of a local custom since the inhabitants of the town "may not have the inheritance." Id. at 236. The Court did state that, as a custom, the inhabitants of a town "may prescribe for an easement in alieno solo; as for a way - for liberty to play at rural sports - to draw nets on another's land - to pass free of toll - for a public landing, etc." Id. at 236, 237. (citing English cases).

The Court did not discuss the underlying assumption that the locus in quo, where the taking took place, in fact belonged to the plaintiff. Although the defendant had pleaded that the taking itself was from Sanbornton Bay, a public, navigable, inland waterway, the Court, without discussion, found that the taking was from Perley's land. Therefore, the court held that there was no justification for the defendant's trespass across the plaintiff's close.

2. The Nudd Case

In the next case, Nudd v. Hobbs, 17 NH 524 (1845), the defendant was charged with trespass for breaking and entering the plaintiff's close in the Town of Hampton. The defendant first pleaded in justification that there was a right of way, common to all inhabitants of Hampton, over the plaintiff's land to the seashore. The Court found that there was a public right of way acquired by custom, citing as precedent the Perley case and Chitty on Pleadings 1116, notes y & w, 9th Am. ed. .

The defendant, Hobbs, in addition to pleading a right of way by custom across the plaintiff's land, also pleaded that

there was a customary right of the inhabitants of Hampton to take seaweed and rockweed from the shore of the ocean and that this custom was a justification for his crossing the plaintiff's land. A third plea reiterated the taking by custom justification but relied upon the defendant's status as a citizen of the state and not just an inhabitant of Hampton. The Court found the second and third pleas to be insufficient, Nudd v. Hobbs, 17 NH at 526.

The Court appears to have dismissed these last two claims on procedural grounds. Thus the Court was able to avoid deciding which of the two conflicting authorities controlled ownership rights in the foreshore, i.e.; the Colonial Ordinance which governed Hampton at one time, or the English law and local customs which prevailed in New Hampshire at the time Hobbs was decided. The Court therefore held the second plea insufficient on the basis that "it [did] not appear from anything stated in the second plea that the locus in quo was below high water mark." *Id.* at 526.

The third plea was also dismissed as insufficient based on the Court's finding that the defendant had admitted that the close of the plaintiff, from time immemorial, was and is "contiguous and adjoining the Atlantic ocean" and defendant's pleading that his entry was on to land between high and low water essentially admitted that the plaintiff owned the land between high and low water. Nudd v. Hobbs, 17 NH at 526. The Court holding against the defendant on these narrow grounds went on to say that "the question is not raised, therefore, by these

pleas, whether by the general rules of law the title of the owner of land bounded on the sea-shore extends to low water mark." *Id.* at 526.

In dicta the Court stated that

it may perhaps be held that the first enactment of the general assembly ... which provided that the laws they had formerly been governed by should be a rule in judicial proceedings, so far as they would suit our constitution, and not be repugnant to the laws of England until others were legally published, included the ordinance of 1641, so that it has been transmitted as the rule ... to the present day. *Id.* at 527, [citing State v. Rollins 8 NH 561 (1837)].

The language used by the Court (i.e.: "it may perhaps be held") seems to indicate an unwillingness to follow affirmatively the ownership-to-low-tide provisions of the Ordinance. If the Ordinance had indeed been the rule in New Hampshire and actually followed by the Hampton inhabitants from the time of its first enactment some 200 years earlier, then the Court could have used much stronger language in defining the parameters of ownership. The Court instead relied on the legal construction of the defendant's pleas to find that in this particular case the land between high and low tide was admitted to be owned by the plaintiff.

The Court in referring to the question of New Hampshire's adoption of the Ordinance found that "[h]owever this may be, the question raised ... is whether the inhabitants of a town, or the citizens of the state, can justify an entry into the land of an individual, and the taking of seaweed and rockweed therein, for their own use, under a custom ... " Nudd v. Hobbs, 17 NH at 527. The Court, answering this question in the negative, held

that "[s]eaweed and rockweed thrown upon the shore belongs to the owner of the land upon which it is deposited." *Id.* at 527 (citing English and Connecticut cases). The Court also analogized this right to one held by shoreland owners when a shipwreck washes ashore. Under those circumstances the owner of the shore has a preferential right to the abandoned property against that of a mere stranger. *Nudd v. Hobbs*, 17 NH at 527.

Thus having found that Nudd was the owner of the land by the constructive admission in the defendant's pleas the Court had no problem in applying the rule set forth in the *Perley* case, i.e.: that there can not be custom for the inhabitants of a town or state to take such a profit in another's land. The land was thereby found to be within the plaintiff's right of control as against intruders who sought to take a profit a prendre in seaweed and rockweed thrown upon the shore.

3. The *Knowles* Case

The next case brought for trespass quare clausum fregit on the New Hampshire shore was also at Hampton, *Knowles v. Dow*, 22 NH 387 (1851). This case dealt with the question of the defendants' right to use the plaintiffs' land to haul, deposit, and then carry away seaweed and flatsweed. There were six pleas entered by the defendant to justify the acts complained of. Two of the pleas asserted that the close was the soil and freehold of the state and not the close of the plaintiffs' and two pleas dealt with prescriptive rights claimed by the defendants. These first four pleas were not submitted to the jury due to lack of evidence.

The last two pleas concerned: 1) the right of the Hampton inhabitants (and therefore the defendant who lived in Hampton), acquired by custom, to haul, deposit and carry away seaweed and flatsweed and 2) that the acts complained of were done "by the leave and license" of the plaintiff. Knowles v. Dow, 22 NH at 388, 389. The jury's verdict was for the defendant on the last two pleas and the plaintiff moved to have the verdict set aside alleging that the custom claimed was unreasonable. The Supreme Court overruled the plaintiff's motion and rendered judgment on the verdict.

In recounting the trial court's findings the court reporter noted that the locus in quo was above the high water mark (on the sand dunes) and this was the only area in contention. "[I]t was not denied by [the plaintiff] that the defendant had a right to procure seaweed between high and low-water-mark." *Id.* at 389. At trial both plaintiff and defendant produced witnesses who testified to the fact that they had seen the defendant and some thirty others from Hampton use the dunes for depositing seaweed for more than twenty years. Knowles v. Dow 22 NH at 406, 409. The Supreme Court held that "the custom alleged and substantially proved was to deposit upon the beach or sand-hills of the plaintiffs the seaweed gathered between high and low-water-mark. In this there seems to be nothing unreasonable." *Id.* at 405.

Reconciling the Early Cases

The Knowles and Hobbs decisions are consistent. At that point the Court had not been required to decide who had title to

the foreshore. The habits, if not the legal custom, of the people living on the coast appear to have been in direct conflict with the Massachusetts Ordinance. The testimony of various witnesses in the Knowles case fleshes out this idea. One of the plaintiff's witnesses noted that the activity complained of had gone on without objection until 1845.

Through cross reference of dates and cases this writer was able to map an interesting historical development. In 1847 the unreported case of Nudd v. Lamprey was decided in Rockingham County^Y. The county includes the town of Hampton and most of the New Hampshire coastline. The defendant in that action, Uri Lamprey, was one of the defendant's witnesses in the Knowles case in 1851. In Knowles Lamprey testified as to his knowledge of the defendant's claimed licence to haul and deposit seaweed. The plaintiff attempted to have Lamprey declared incompetent to testify on any of the issues because, as an inhabitant of Hampton, he was a party interested in having the Court find that a custom to haul and deposit seaweed did exist. The court however found him competent to testify on the issue of the defendant's licence.

The Aberation Takes Form: Clement and Concord Manufacturing

The unreported Nudd v. Lamprey case was discussed by Chief Justice Charles Doe in a decision handed down in 1889. Justice Doe believed that Nudd v. Lamprey set out the definitive answer to the question of who owned the land in New Hampshire's intertidal zone. The voluminous opinion written by Justice Doe, Concord Manufacturing Co. v. Robertson, 66 NH 1, 25 A 718

(1889), attempted to set the record straight once and for all. Justice Doe believed that the state held fee simple title to the foreshore.

Unfortunately, the legal reasoning set forth concerning the tideland ownership was all dicta. The Concord case itself concerned the diversion of water away from the plaintiffs' mills by the defendants cutting and removing ice from the mill stream pond. The Court held that the facts as agreed upon by the parties did not show that the defendants use was unreasonable or that the plaintiffs suffered any damage. The case was discharged for trial on those disputed issues. Concord Manufacturing Co. v. Robertson, 66 NH at 30.

The thrust of Justice Doe's opinion was aimed at destroying the idea that New Hampshire follows the Massachusetts Ordinance, especially with regards to the tideland ownership provision. The opinion states unequivocally:

In Nudd v. Lamprey, decided in the county of Rockingham at the December term, 1847, it was held that the provision of the Massachusetts ordinance relating to the shore of tide-waters has not been adopted and is not in force in this state; and there is no ground on which that case can be overruled. The introduction of any other line than high-water mark as the marine boundary would overturn common-law rights that had been established here, by a usage and traditional understanding of two hundred years duration, before they were questioned in Nudd v. Lamprey. And the rejection of the whole ordinance, except the clause defining a "great pond" as one "containing more than ten acres of land," may leave little ground for the claim that this definition has become a part of our law. There would be a distinction between public and private ponds if the ordinance had not been passed, and the common-law classification can be determined and applied by common-law means and methods. Concord Manufacturing Co. v. Robertson, 66 NH 1, 27.

Had this case been on point and/or the only one decided since Knowles, the ownership question might have been answered at last. There was one case, however, decided in 1862, some eleven years after Knowles and twenty seven years before Concord. That case, Clement v. Burns, 43 NH 609 (1862), was on point and decided the general rule of intertidal ownership in favor of the Ordinance of 1647. The Concord opinion sought to overturn the decision in Clement.

The Clement Case

The Clement case took place in Dover and the locus in quo was "a part of the shore of the navigable waters of the Cochecho River, between high and low water mark" and a roadway laid out by the town to the low water mark. Clement, 43 NH at 610. The road crossed the plaintiff's land and the complaint alleged three basic counts against the defendant which sounded in trespass and conversion.

The defendant allegedly used the road and the plaintiff's wharf for the purpose of bringing in earth by boat. The Court found that the road was legally laid out by the Town Selectmen and that the entry upon the wharf was justified. *Id.* at 615, 616. The remaining question, decided against the defendant, concerned the fact that some of the defendant's mud had intermingled with the plaintiff's manure under the wharf and the defendant in reclaiming his mud had also carried away some of the plaintiff's manure.

The Court appeared to meld the right of wharfing out and the general preferential rights claimed by littoral land owners

to use the shore for their own purposes, with the fee interest in the intertidal property. This lack of distinction was systematically rebutted by Justice Doe in the Concord case, but the fact remains that the Court in Clement did define the law in favor of the Ordinance:

As a rule of positive law, the ordinance of 1641 was not binding upon New Hampshire; but when we consider that a union was effected in that same year between New Hampshire, or so much of it as then settled, and Massachusetts, which was continued for about forty years, making them practically one government, we should naturally expect that the same usages would spring up here under that ordinance, especially as such was actually the case as to one shore of the Piscataqua river, which then, as now, afforded the principal part of the navigable waters of this State. That a similar usage did spring up, and has always existed, giving to the riparian owner an interest in the shore of navigable waters, subject only to the paramount right of navigation, which interest he may vindicate by suit, we think there is good reason to believe, and therefore for the entry upon the shore below the wharf and carrying away the soil and manure, the plaintiff is entitled to recover; but it must be only nominal damages. Clement v. Burns 43 NH 609, 621.

Although the Court in Clement recognized that the Ordinance was not binding in New Hampshire, the decision holds that as a matter of common law the provisions of the Ordinance were adopted. Justice Doe in Concord noted that this legal fiction was the only way the Clement court could reach the conclusion that the plaintiff was able to prevail in the suit brought for trespass q.c.f., and to do so the Clement Court had to, in their own words, "overlook [] nice technicalities" Clement v. Burns. *Id.* at 620. Justice Doe maintained that the real issue in Clement concerned "title by accretion of realty or

confusion of personality." Concord Mfg. Co. v. Robertson at 23. (Citing English cases).²

C. Federal and U.S. Supreme Court Cases.

The question of who owns New Hampshire's foreshore has never reached the federal courts although it has been discussed in dicta.

In Percy Summer Club v. Astle 163 F 1 (1st Cir. Ct. App. 1908) the issue was ownership of a New Hampshire lake which was completely surrounded by land owned by the Percy Summer Club of New Jersey. The Club sought an injunction against all trespassers who crossed the Club's land and fished in the lake claiming they alone had the right to fish in the lake. The circuit court dismissed the complaint, Percy Summer Club v. Astle 145 F 52 (1900) and the Circuit Court of Appeals affirmed the decision. The Circuit Court of Appeals discussed the tideland dispute with regards to the Massachusetts Ordinance's effect on the case at bar. They held that "[t]he New Hampshire court has tended to hold free the fishery in all considerable lakes and ponds, basing its action partly upon the analogy of the Massachusetts ordinances, and partly upon an appreciation of local usage." Percy Summer Club v. Astle, 163 F at 12.

The Court noted in dicta that the Ordinance was not adhered to by the New Hampshire Court with regards to tidelands although it continued to have some effect on New Hampshire law concerning fresh water. The court quoted the rejection of the

Ordinance in Nudd v. Lamprey, supra, as being controlling only with regard to tidelands:

In Nudd v. Lamprey, an unreported case, decided in 1847, referred to in Concord Mfg. Co. v. Robertson, 66 NH 1, 25 Atl. 718, 18 L. R. A. 679 (1889), the court held that the owner of the upland had not the exclusive right to take seaweed from the adjoining flats. In his opinion Chief Justice Parker said:

"The court instructed the jury that the seashore belonged to the owner of the adjoining land to low-water mark. If this ruling be correct, it must be because the English common law has been abrogated by the Massachusetts ordinance of 1641; but we cannot hold that that ordinance was adopted here either in practice or as law. The temporary union of this state with Massachusetts did not make that ordinance the abiding law of this state. There was no possession upon which plaintiff can maintain his action. We know of no legislation by which the ordinance of 1641 is in force here, and the counsel for plaintiff seem to admit that they do not understand how it is in force in Massachusetts and Maine." Percy Summer Club v. Astle, 163 F at 7, 8.

This quote and the brief notation in the Concord Mfg. Co. case are all that remain of the Nudd v. Lamprey opinion. The document itself was removed from the case file by Justice Charles Doe in 1883 and was never returned.³

The U.S. Supreme Court water rights case, Shively v. Bowlby, 152 U.S. 1 (1894) cited Hobbs, Clement, and Concord Mfg. Co. as supporting the statement that "[i]n New Hampshire, a right in the shore has been recognized to belong to the owner of the adjoining upland, either by reason of its having once been under the jurisdiction of Massachusetts, or by early and continued usage." Shively v. Bowlby, 152 U.S. at 20.

The Court did not elaborate on what type of "right" this was. Since the Concord decision was cited with the two cases

holding contra perhaps the court believed that this right was not a fee simple title to the foreshore. The Shively case dealt with Oregon law and the Court did not discuss the New Hampshire dispute.

Unfortunately, these two federal cases do not shed much light on the New Hampshire intertidal ownership question. Although the court in Percy Summer Club addresses the conflict in dicta it does not define the parameters of ownership. The Shively case merely indicates that the owner of the adjoining upland has some type of preferential right to the foreshore.

III. State of the Law Today

Since the Clement case was decided there have been no New Hampshire cases which put the ownership of the intertidal zone directly in issue. The majority of cases have dealt with public rights in non-tidal water bodies and the effect of the Massachusetts Ordinance with regards to them. The case of Hampton v. Palmer 102 NH 127 (1959) was a dispute over who owned the land at the old "fish house area" in Hampton once used as a common. The outer boundary of the land in the old records was noted as "ye sea" and the court did not address the intertidal ownership question as part of the decision. Hampton v. Palmer 102 NH at 131, 132.

The only other case which deals with ocean front property and even mentions the question of intertidal ownership concerns a Rye, NH town ordinance which regulates surfing. State v. Zetterberg 109 NH 126, 244 A2d 188 (1968). The Court

specifically declined to rule "on the question of the extent of the ownership and of the nature of the rights and privileges of littoral owners with respect to the beach which adjoins their properties." State v. Zetterberg 109 NH at 128, 129.(citing Clement v. Burns and Concord Mfg. Co. v. Robertson).

Other recent cases deal with NH RSA 483-A (1967, amend. 1983), the statute regulating dredge and fill in wetlands and protecting the sand dunes in Seabrook. [See Sibson v. State 110 NH 8 (1969), 115 NH 124 (1975) and cases following]. This protective measure does not address the question of ownership or the rights of the public with regard to use of intertidal property. The question of ownership still requires some type of resolution.

The majority of outer coastland in New Hampshire is held by the state and only 20 to 25% remains in private hands. However the lands abutting Great Bay and the tidal rivers [which provide boating access and shelter] are primarily in private hands. The ownership rights to intertidal land, and the public rights to walk, play, picnic and otherwise obtain access to the entire tidal area are not a source of major conflict at present. As the coast becomes more crowded, and the public seeks greater access to areas presently used only by littoral land owners, there may be pressure on the private owners to close off access points. There may come a time when the majority of the public will have only limited access to the New Hampshire shore and accessibility will be reserved to those individuals able to pay for the privilege.

A statutory provision defining the ownership rights or boundaries may avert this potential problem. The case law, although contradictory, can be seen to support the public right to access for recreational purposes. The case law supports a finding in favor of public usage which is not related to taking profits a prendre. This may be used to support a statutory provision which mandates public access to the intertidal zone irrespective of legal ownership of the land.

FOOTNOTES

1. A right a prendre, also known as a profit a prendre, is an easement in land including the right to appropriate and take soil, or a product of it, which can be assigned a value. 1 G. Thompson, Commentaries on the Law of Property, sec.
2. Had Justice Doe not been "of counsel" to one of the parties in the Clement case prior to his appointment to the bench perhaps his forty page unpublished opinion for Clement v. Burns would have controlled the outcome of that case and made this present day inquiry unnecessary. Justice Doe's draft opinion for the Clement case is preserved at the New Hampshire State Law Library.
3. A long and fruitless search failed to unearth the unreported Nudds v. Lamprey case cited by Justice Charles Doe. The following sources were exhausted in the search:
 - a) NH State Law Library, Concord, NH
 - b) Rockingham County Courthouse Library, Exeter, NH
 - c) NH State Archives, Concord, NH
 - d) NH State Library Special Collections, Concord, NH
 - i. Justice Doe
 - ii. Governor Bell
 - e) NH Historical Society, Concord, NH
 - f) First Circuit Court of Appeals Library, Boston, MA
 - g) Federal Records Center, Waltham, MA
 - h) University of Maine Law School Library, Portland, ME
 - i. Records and Briefs volume for Percy Summer Club Case
 - i) Franklin Pierce Law Center Library, Concord, NH
 - j) Professor John Phillip Reid, Biographer of Justice Doe University of New York Law School, NY, NY
 - k) Concord Public Library, Concord, NH
 - i. Justice Elwin Page Collection

Other sources were recommended but were not pursued due to time limitations:

- a) Papers of John Henry Wigmore, Clerk to Justice Doe
- b) Justice Doe Homestead, Rollingsford, NH
note: Relatives of the late Justice are reported to prefer privacy.
- c) Papers of Judge Robert Pike, NH Superior Court
- d) Papers of Judge Jeremiah Smith, NH Supreme Court

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