MAINE LAW AFFECTING MARINE RI

REGULATION OF THE COAST: LAND AND WATER USES

Partial report under a study carried out under the joint sponsorship of:

The School of Law of the University of Maine

and

The National Science Foundation
Office of Sea Grant Programs

MAINE LAW AFFECTING MARINE RESOURCES

VOLUME III

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LAND AND WATER USES

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MAINE LAW AFFECTING MARINE RESOURCES

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NON-STANDARD ABBREVIATIONS

For the sake of brevity, the following non-standard abbreviations and forms of citations have been used in this report.

Supreme Court	Refers to the Supreme Judicial Court of Maine unless otherwise indicated.
P.L. 1969, c.23	Public Laws of Maine are cited by legislative year and chapter number.
P.&S.L. 1969, c.22	Private and Special Laws of Maine are cited by legislative year and chapter number.
Resolves, 1969, c.21	Resolves of the Legislature are cited by legislative year and chapter number.
32 M.R.S.A. 1751	Public Laws of Maine which are compiled in Maine Revised Statutes Annotated will generally be cited by reference to the Title and Section numbers of Maine Revised Statutes Annotated.
(Supp.)	When followed by (Supp.), a citation in the above form refers to the Cumulative Pocket Supplement for use in 1968-9 of Maine Revised Statutes Annotated.
	Even though collected in Maine Revised Statutes Annotated, public laws may be referred to by legislative year of enactment and chapter number: When year of enactment is material. When year of amendment is material. When statute is referred to for first time.

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Portland, Maine
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CHAPTER FIVE POLLUTION*

..."Public convenience or health",...require that the refuse matter and impurities in large cities should be deposited and dissipated in the sea, which is the great receptable provided by nature for the offscourings of the land.[1]

The mills and manufactories upon our rivers and streams, though they have banished the former denizens of these waters, furnish a compensation immeasurable as compared with all the fish that have ever floated in their bosom.[2]

We have lost a million dollars worth of scallops. We have lost our recreation. We have lost everything due to pollution...Now, why, for God's sake, can't we clean up this mess?...when I go to the end of my wharf and I look over and see chicken feathers, and see entrails go by, I damn you up and down. Why? Why? Why?[3]

When there were few of us we could dump our sewage into the rivers or the sea with confidence that nature would take care of it. But in the crowding modern world, that simple way of disposing of our waste turns our streams into sewers and requires the posting of beaches and flats against taking either a shellfish or a bath.[4]

INTRODUCTION

Until relatively recently, the capacity of the ocean to receive unlimited waste was not questioned. As the despoilment of the land increased, so did the amount and type of waste going into the ocean.

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* Robert J. Gingras, University of Maine School of Law, 1970, has made a major contribution to this chapter.

1. Franklin Wharf v. Portland, 67 Me. 46, 54 (1877). Compare, "Since we want to keep our air and our rivers and our lakes pure, it seems inevitable that we must dump large quantities of our waste into the ocean. But we must be careful to convert them first into forms which will do the least possible damage to the water or the life therein." (Dr. Lee A. Dubridge, President's Science Advisor, U.S. News and World Report, January 19, 1970, p.48.).

2. Address, Gov. Samuel Cony, February, 1865. Public Laws and Resolves of Maine, 1863-65, p.451.

The most dramatic cries of "halt" have been raised against the national policy of dumping radioactive waste into the ocean and most recently, against the practice of disposing of poison gas in ocean areas beyond the territorial sea.[5] Prophets of doom have predicted the eventual demise of the ocean with the resultant extinction of mankind as the oxygen producing capacity of the ocean is extinguished.[6] Any meaningful appraisal of the limits of the ocean to absorb pollutants and the predictable consequences of a continuing, ever increasing use of the ocean for this purpose, however, is quite obviously beyond the scope and competence of this report. A consideration of the extent of this pollution in Maine, its effects from an economic and conservation point of view, and the adequacy of Maine law to rectify or alleviate any misuses being made of the ocean in Maine are the major topics to be dealt with in this chapter.

It cannot be doubted that from a short-range economic point of view, it may make sense to dump waste material into rivers or oceans. It is a cheap way to dispose of it. The flow of a river will carry the waste downstream from the source of the pollution to the sea. The ebb and

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3. Proceedings: Conference on Pollution of Penobscot River, Upper Bays and Tributaries. Belfast, Maine, April 20, 1967, p.245, 251.

4. Symposium, The Maine Coast Prospects and Perspectives, (1966) Charles W. Elliot, "As Maine Goes, Which Way?" p.4.

5. New York Times, July 4, 1969, p.4:2.

6. See Myers, Edward A., Saving The Sea Around Us, Maine Sunday Telegram, December 14, 1969, p.7D; New York Times, December 12, 1969, p.21.

flow of the tide will further dissipate the pollution, (or dissipate it in the first instance, if dumping is directly into the ocean), although the tidal action may bring in pollutants as well as carry them out to sea. This cheap mode of disposal is "economical," however, only so long as the rate of dumping does not exceed the waters' capacity to receive, dissipate and biologically degrade the added material. Since that capacity is now generally exceeded, the cost-benefit to the town, industry or individual so disposing of waste must be balanced against the cost to others, and to society at large.

A primary consideration is health, which cannot always be neatly separated from aesthetic considerations with regard to odor and filth. Economic disadvantages may also be felt immediately by down stream manufacturers, who require clean water for their industrial processes. It has been suggested, and not facetiously, that the quality of water would be materially improved if every manufacturing enterprise was required to place its water intake below its plant instead of above it.[6a] Added to health and manufacturing needs are other considerations for living resources--the most significant of which are human. Pollution and degration of streams and seashore prevent the recreational use[7] of these areas, depress land values and tax revenues,

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6a. Bardach, J., Harvest of the Sea, (1968) p.237.

7. The East End Beach on the Eastern Promenade in Portland was closed because of pollution several years ago; according to Lewis Mumford only San Francisco Bay equates this area in beauty; the loss due to pollution is immeasurable in dollar amounts alone.

and kill fish[8] and vegetation which provide sustenance to many and a livelihood to quite a few. Reports of fish kills do not include the valuable shell fish resources which are lost when flats are closed because of contamination.

As noted in Volume I, p.77, pollution is now emerging as a first priority consideration on the local, state, and national levels. The legal machinery and the financial backing has not caught up with this great new sense of dedication and awareness. The principal pollution problems in Maine may be classified as people pollution, agricultural pollution, and industrial pollution; the latter category could be further subdivided into food processing waste, industrial waste and chemicals, etc., and the feared future pollutants, oil, heat from nuclear power plants, and radioactivity. These categories are not mutually exclusive and are obviously quite overlapping and interdependent but are all part of the pollution problem.[9]

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8. See Pollution Caused Fish Kills, 1968, U.S. Department of the Interior, Federal Water Pollution Control Administration. This report lists fish kills during 1968 in the Prestile Stream, the Androscoggin River, an unnamed brook at Turner, and the Medomak River at Waldoboro.

9. A feeling for the problem may be gained from the following statements and facts: Several of Maine's major tidal rivers are unusable for any purpose other than sewage. (Chairman of the Environment Improvement Commission, Donaldson Koons, Maine Sunday Telegram, March 23, 1968, p.13D); For 12 to 13 miles below the Bangor Dam, at low tide, there is no free oxygen left in the Penobscot River. (Portland Sunday Telegram, August 7, 1966, p.3D); The Presumpscot River receives 27 million gallons of industrial wastewater and 658,000 gallons of raw sewage each day at Westbrook alone. (Portland Sunday Telegram, December 31, 1967, p.1D); The presence of pesticides has been found in Maine's marine shell fish and crustacea. The residue in lobster alone increased from virtually zero in 1966 to .635 parts (Cont'd)

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Note that Maine has not actually experienced significant pollution from the last three sources; their dramatic nature, combined with the fact that there is no established industry or municipality whose budget depends on the continuance of such pollution, make them far simpler to deal with by preventative action than are the "established" sources.

Before discussing specific types and sources of pollution, statutory provisions and the common law with regard to pollution of fresh and tidal waters will be set forth.

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9. (cont'd) per million in 1968. (Portland Press Herald, September 11, 1968, p.26); 70,000 acres of inshore flats and waters of the Maine coast, representing 20% of the area available for the support of the traditional bivalve shell fish population -- clams, quahogs, mussels and oysters -- and 50% of the total shell fish supply in terms of productivity have been closed because of bacterial pollution. (Statement of Robert L. Dow, Research Director, Maine Department of Sea and Shore Fisheries, before Special Sub-Committee on Air and Water Pollution of the Senate Committee on Public Works, Hearing on Federal Water Pollution Control, Portland, Maine, June 2, 1965); In July of 1968, an international "incident" occurred when residents of Centerville, New Brunswick, dammed up an international river polluted beyond their endurance by a Maine potato plant. (Report on the Governor's Committee on Pollution Abatement, February, 1969).

10. See p.482 for report of amount of spillage from pipeline operation.

I STATUTORY REGULATION OF POLLUTION[11]

EARLY LEGISLATION

As early as 1841 "corrupting or rendering unwholesome or unpure, the water of a river, stream or pond..." was designated a public nuisance.[12] Another measure of long standing provides severe penalties for knowingly and willfully poisoning, defiling, or in any way corrupting a water supply used for domestic purposes for man or beast.[13] The penalties are in fact so severe, that courts have not convicted under its provisions. As pointed out in State v. Blaisdell[14] the penalties provided for violation are more severe than those punishing manslaughter, mayhem, or assault.

Industrial pollution was being fought in courts in the latter nineteenth century[15] to the now familiar refrains of payrolls versus pollution, but no administrative machinery for the regulation and abatement of pollution was enacted until the 1940's. Unlike the carte blanche given to

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11. Statutes relating to the Environmental Improvement Commission may be found in 38 M.R.S.A. 361 et seq.

12. R.S. c.164, §1 (1841). Most of the original language has been retained in 17 M.R.S.A. 2802.

13. P.L. 1891, c.82. See Statutes of Maine 1885-1895, Freeman's Supplement, p.504. Penalties incorporated in the original act provided for a fine not exceeding $1,000 or by imprisonment not exceeding one year. The present provision found in 38 M.R.S.A. 571 provides for a fine of not more than $5,000 or by imprisonment for any term of years.

14. 118 Me. 13, 105 A. 359 (1919).

15. See Lockwood v. Lawrence, 77 Me. 297 (1885).

industrial pollutors by Governor Cony[16] later Maine governors recognized pollution as a problem to be dealt with rather than an index of prosperity.[17]

MODERN ERA

The modern era of statutory control coincided with public outcry caused by the polluted condition of the Androscoggin River.[18] In 1941 the Sanitary Water Board was created to deal with this problem, but was also given the broader duty to study, investigate, and make recommendations to pollutors of the streams and waters of the State as to ways and means of eliminating "all substances and materials which pollute or tend to pollute."[19] The $400 annual appropriation and the lack of any effective control machinery in the authorization assured that no effective pollution control would result from this legislation. This "policy without punch" approach in dealing with the protection of water quality has been evident in legislation until relatively recently.

In 1945, the Sanitary Water Board's duties were expanded by legislation providing that:

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16. Compare fn. 2.

17. See Inaugural Address of Governor William Tudor Gardiner, January 3, 1929, Laws of Maine, 1929, p.900; Inaugural Address of Governor Horace Hildreth, January 2, 1947, Laws of Maine, 1947, p.1270.

18. According to the Maine Legislative Record, House, February 5, 1941, p.150-1, the pollution load on the Androscoggin was 63,957,630 gallons of sewage and industrial waste per day.

19. P.L. 1941, c.209.

> No person, firm or corporation shall hereafter discharge into any stream, river, pond, lake or other body of water, or water course, or any tidal waters any waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment so as to constitute a new source of pollution to said waters without first obtaining a license therefor from the sanitary water board; provided, however, that no application for a license shall be required hereunder for any manufacturing, processing or industrial plant or establishment, now or heretofore operated, for any such discharge at its present general location, such license being hereby granted.[20]

The "grandfather clause" incorporated into this statute granted free license to existing polluters to continue their polluting activity regardless of effect on the receiving waters. Under the same act, the Board could deny a license for any new discharge if it determined that such discharge would cause an increase in pollution in a manner "inconsistent with the public interest",[21] but the ambiguity of the term "public interest" combined with a lack of any specific guidelines as to the quality of water that ought to exist in the receiving waters, lack of public support, staff and appropriations deficiencies rendered a potentially effective licensing tool virtually useless as a method of pollution control.[22]

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20. P.L. 1945, c.345, §3. See State v. Glidden, 228 N.C. 664, 46 S.E. 2d 860 (1948) for a "grandfather clause" in a pollution statute that was declared unconstitutional. In that case, all corporations chartered before March 4, 1915 were exempted.

21. P.L. 1945, c.345, §4.

22. The licensing statute has been termed little more than a means of cataloging new sources of pollution. O. Delogu, Effluent Charges: A Method of Enforcing Stream Standards, 19 Maine L. Rev. 29, 32, (1967).

Impetus was given to the statutory regulation of pollution by a 1950 Report on Water Pollution in the State of Maine.[23] The authors of this survey noted the rapid rate of deterioration of the state's natural resources, and documented the existing sources of pollution affecting surface waters of the state and the general poor water quality of major rivers and streams. Recommendations included immediate action on a pollution control program and a classification according to highest common use of each river, stream and coastal area. The Legislature reacted to the report by creating the Water Improvement Commission in 1951[24] (replacing the Sanitary Water Board) and charging it with making recommendations to the Legislature for classification of rivers, streams and coastal flats based on reasonable standards of quality and use.[25] Although it was authorized to employ a staff, funds allocated for this function were again minimal.[26]

Present pollution statutes are based on legislation enacted in 1953[27] which established four water classification standards and directed the

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23. This report was a joint effort of the Department of Health and Welfare, Division of Sanitary Engineering in collaboration with the Department of Agriculture, Department of Sea and Shore Fisheries, and the Sanitary Water Board, which was made possible under appropriations under the Water Pollution Control Act of 1948, (62 Stat. 1155 (1948).

24. See Vol. I, p.73 for present composition of this agency now known as the Environmental Improvement Commission.

25. P.L. 1951, c.383.

26. P.&S.L. 1951, c.192.

27. P.L. 1953, c.403.

Commission to make recommendations to the Legislature for appropriate classifications of each lake, river, stream and tidewater area within the State.

After adoption of the classifications, it became "unlawful...to dispose of any sewage, industrial or other waste, either alone or in conjunction with another or others, in such manner as will lower the quality of the said waters, tidal flats, or section thereof, below the minimum requirements of such classification..."[28] An amendment gave the Commission power to issue enforcement orders, and appropriate legal action to secure compliance. Originally, enforcement was hampered because unless a pollutor submitted to the jurisdiction of the Commission voluntarily, he was not subject to its orders. This defect was not remedied until 1968; now, after due notice and a hearing, a person or corporation may be subject to the orders of the Commission whether or not he appears.[29] A 1953 amendment added municipalities to entities covered by the pollution restrictions, and sewage was added to the list of effluents which required a license for any new source of pollution.[30]

The language to "lower the quality of said waters" was amended in 1961 to read:

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28. Id. §2.

29. P.L. 1967, c.528.

30. P.L. 1953, c.403, §3.

> ...either alone or in conjunction with another or others, in such manner as will, after reasonable opportunity for dilution and mixture, lower the quality of any significant segment of said waters, tidal flats or section thereof, affected by this discharge. (Underlined indicates new wording.)[31]

The underlined phrases were probably intended to make it possible to prosecute for the downgrading of a relatively small portion of a stream rather than making it necessary to have the pollutant lower the quality of the whole stream, but to preclude prosecution for a condition existing only at the discharge outlet. As a practical matter, the indefiniteness of these phrases has made it virtually impossible to determine when there has been a classification violation.[32]

Just as with industrial pollution (operating prior to August 8, 1953) a "Grandfather Clause" exempts outfalls or facilities of municipal sewers which existed on September 1, 1959.[33] Otherwise, a license is required for any new source of pollution in salt or fresh, classified or unclassified waters.[34]

These"Grandfather Clauses" constitute a basic impediment to effective pollution control. Theoretically, any change in process which increases the quantity or polluting quality of the discharge constitutes a new source of pollution, and requires a license from an industry or municipality, even though covered under the Grandfather Clause. In actuality, it

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31. P.L. 1961, c.305, §4.

32. Interview with Robert Fuller, Assistant Attorney General, March 1969. See also State Water Improvement Commission v. Morrill, Me. 231 A. 2d 437 (1967).

33. P.L. 1959, §8.

34. Id.

has been impossible to document the quantity and quality of the discharge as it existed in 1953 in an action brought in the '60s and '70s. Similarly, the sanction given to municipalities to operate any outfall or facility in existence on September 1, 1959 means in effect that any number of new houses or new industries[35] connected to a municipal sewer which has not increased its number of outfalls may discharge any additional amount or type of sewage with impunity without being subject to the license requirement. Because of the language and the exemptions, most pollution cases are brought under the license procedure rather than under violation of the classification standards.[36]

In 1963, the Legislature for the first time established four separate classifications for tidal waters, and simultaneously assigned such classifications to the major portions of the tidal waters in the State.[37] Though it thus made its verbal commitment to pure water, fresh and tidal, note that the Legislature at no point has surrendered control over classification to an independent agency. Classifications are legislatively prescribed, and thus remain part of the political process.[38]

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35. But see 1963-4 Attorney General Report, p.90, to the effect that a sewer district could not be forced to accept into a sewer system, for treatment, industrial waste not compatible with the present system of treatment. The opinion warned that the matter was still an open question and at some future date might be the subject of litigation by one or more industrial plants.

36. Interview with Robert Fuller, Assistant Attorney General. It has been estimated that 70% of the total number of pollutors fall under the Grandfather Clause. (Maine Times, August 1, 1969, p.13.)

37. P.L. 1963, c.274.

38. See 38 M.R.S.A. 365-7 for classification procedure.

In 1967, in response to federal pressures[39] and signs of the times, the Maine Legislature again strengthened its pollution control statutes and set up a comprehensive time table for any waters classified or reclassified on or after January, 1967, so that compliance with the new classification would be achieved by October 1, 1976.[40]

At the same session the classifications of many bodies of water were revised upward[41] with the intent of improving the quality of water in Maine; in the short haul, these reclassifications actually had the opposite effect, because the old classification was repealed and compliance with the new classification was not required until 1976.[42] This

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39. See Water Quality Act of 1965, (79 Stat. 903 (1965)); Clear Water Restoration Act of 1966, (80 Stat. 1246 (1966)). See Hines, 52 Iowa L. Rev. 799 (1967) for review of federal legislation.

40. 38 M.R.S.A. 451, as amended by P.L. 1967, c.475. Although there are specific provisions for certain waters the general time table provides:
    A. Preliminary plans and engineers' estimates shall be completed and submitted to the Water and Air Environmental Improvement Commission on or before October, 1969.
    B. Arrangements for administration and financing shall be completed on or before October 1, 1971. This period, in the case of municipalities, shall encompass all financing including obtaining of state and federal grants.
    C. Detailed engineering and final plan formulation shall be completed on or before October 1, 1972.
    D. Review of final plans with the [Water and Air] Environmental Improvement Commission shall be completed and construction commenced on or before October 1, 1973.
    E. Construction shall be completed and in operation on or before October 1, 1976.

41. E.g., P.L. 1967, c.19, c.180.

42. The problem was explained thusly in the Kilmister-Fuller Report (See fn. 45.
    EXAMPLE: A stream is classified C as of December 31, 1966. In 1967 the Legislature upgrades it to B-2. Industry A, which was operating prior to August 8, 1953 and thus does not (Cont'd)

defect was ameliorated by the 104th Legislature.[43]

Despite this new timetable (or any previously promulgated time tables), the timetable for any particular industry, municipality, etc. may be accelerated if after hearing the Commission determines that any municipality, sewer district, person, firm, corporation or other legal entity can reasonably complete any or all of the steps at an earlier date.[44]

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42. (Cont'd) need a discharge license, is discharging to the stream and meeting the C classification. After the reclassification, Industry A triples production, with the result that its discharge load violates both the B-2 and C classifications. Under existing law, Industry A, if it meets the timetable, cannot be prosecuted for violating the new B-2 classification, and cannot be prosecuted for violating the old C classification, since that has been repealed. (Industry A could, on these facts, be prosecuted for increasing its pollution load to the stream without first obtaining a license. However, the prosecutor would have to show that the discharge was greater, in terms of pollution, than that existing on August 8, 1953. It is impossible, in most cases, to determine what an industry was discharging fifteen years ago.

43. 38 M.R.S.A. 451, §1 as amended by P.L. 1969, 499 §11 provides that: However, a reclassification adopted on or after January 1, 1967 shall not be deemed to exempt any municipality, sewer district, person, firm, corporation or other legal entity from complying with the water quality standards of the last previous classification, as such standards existed on December 31, 1966, and enforcement action may be maintained for noncompliance therewith; provided, however, that in the event that a time schedule for compliance with the standards of such last previous classification was in existence on December 31, 1966 and the municipality, sewer district, person, firm, corporation or other legal entity was on that date in compliance with such time schedule, then no such enforcement action may be maintained, nor shall any further compliance with such time schedule be required.

44. 38 M.R.S.A. 451 (Supp.).

Governor's Committee on Pollution Abatement

Refinements and strengthening of public laws in the 104th Legislature (1969) were in a large measure the result of recommendations made by the Governor's Committee on Pollution Abatement.[45] An appraisal of the effectiveness of the anti-pollution laws from the Kilmister-Fuller Report was cited by both the majority, and minority members of the Governor's Committee. The Section read:

> We can say from our experience that existing anti-pollution laws are, for the most part, adequate to protect Maine's waters, if they are vigorously enforced. Our problems, as will be seen, arise in areas where existing legislation is ambiguous, is vague, or is inconsistent in its application. The weapons for enforcement exist; but sometimes they are not aimed properly.[46]

The authors of the Report further noted that all pollution statutes are beginning to be rigidly tested in the courts and that to uphold and enforce the law, adequate technical evidence gathered by the Environmental Improvement Commission as well as reinforcements for the Attorney General's staff were needed.[47]

Speaking to the vagueness of the language in the statutes, it had been recommended that 38 M.R.S.A. 413 should specify that "Any changes

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45. See Report of Committee on Pollution in Maine: Suggestions for More Effective Environmental Preservation, February, 1969. Included as Appendix C is the document herein referred to as the Kilmister-Fuller Report. This report, requested by the Attorney General, contains an appraisal of the effectiveness of pollution statutes and recommendations for their improvement by the two assistant Attorneys General assigned the task of enforcing Maine law in this area.

46. Id. at p.C-1.

47. Id.

in character or increase in volume of an existing discharge, whether licensed or unlicensed, shall be deemed a new source of pollution for purposes of this section." (The recommendation was not accepted by the Legislature). The same report highlighted the problem of enforcement connected with the phrases "reasonable opportunity for dilution and mixture"[48] and "any significant segment." No specific proposals were made with regard to this language other than the area permitted for diffusion should be defined with clarity and perhaps should vary with classification.

Perhaps as a result of these comments, the Legislature made a further amendment[49] -- which adds inconsistency to confusion; compare paragraph one of the new section 451 which now reads:

> ...it shall be unlawful for any person, corporation,...to dispose of any sewage, industrial or other waste, either alone or in conjunction with another or others, in such manner as will, after due consideration for seasonal, climatic, tidal and natural variations and after reasonable opportunity for dilution, diffusion, mixture or heat transfer to the atmosphere, within mixing zones reasonably established by the commission in the manner provided by this section, lower the quality of said waters, outside such zones, below the minimum requirements of such classification, and notwithstanding any licenses which may have been granted or issued under sections 413 to 415.[50]

and paragraph four which reads "where no mixing zones have been established..."[51]

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48. See 38 M.R.S.A. 451 (Supp.).

49. Conversation with Assistant Attorney General Robert Fuller, January 25, 1970.

50. 38 M.R.S.A. 451 as amended by P.L. 1969, c.431.

51. Id.

CLASSIFICATION STANDARDS

Criteria for the classification of tidal and fresh waters in Maine are set forth in Chart No. 1 and No. 2.[52] More significant than details of statutory language is the still inadequate scientific knowledge upon which to base legislation. There are no ascertained standards for allowable thermal pollution, radioactivity, and such elements as viral contamination.

The Jordan Company's appraisal of the pre-1969 water classification standards in Maine included the following points: the problem of interpretation of such phrases as "non-injurious to health", "adequate removal of waste", "harmful to fish" etc; the varying interpretations given to the wording of the federal standards; and the dubious validity of the Department of the Interior's policy of never reducing the classification of a body or stream of water. This over-all description of Maine classification standards has not been materially invalidated by 1969 legislation.[53]

> The finite criteria of the existing classification system are based solely upon dissolved oxygen and coliform criteria. There are other forms of pollution, however, which can render a water unfit for certain uses. Biological pollution may be caused by viral contamination. Liquid and sulfitic derivatives are toxic to fish and aquatic life and create unnatural color conditions. Nutrients cause algal growth and create nuisance conditions. While there are many unknowns concerning the type and extent of treatment for these pollutants, they do suggest that a reexamination of the State's water quality criteria is needed.[54]

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52. See 38 M.R.S.A. 368 for specific classification of inland waters; §369 for coastal streams; §370 for tidal waters, and §371 for Great Ponds (which are all classified B-1 unless otherwise specified).

53. Vol. I, Maine Water Resource Plan, p.50-52.

54. Id. at p.52. pH range was added by P.L. 1969, c.431.

FRESH WATER CLASSIFICATION STANDARDS (38 M.R.S.A. 363 as amended by P.L. 1969, c.431)

CLASSIFICATION	A	B-I	B-II	C	D
USES	Bathing, recreation, public water supply after disinfection, commercial purposes that will not lower classification, log driving	Recreation, water contact recreation, potable water supply after adequate treatment, fish and wildlife habitat		Recreational fishing and boating, fish and wildlife habitat. Potable water supply and water contact recreation if adequately treated	Power generation, navigation, industrial process waters after adequate treatment
MINIMUM DISSOLVED OXYGEN					
Percent of Saturation	75% or as occurs naturally	75%	60%		
Parts per million	---	5	5	5 salmon, trout waters 4 non-salmon, trout	2
MAXIMUM COLIFORM BACTERIA (per 100 milliliters)					Not harmful to public health (as determined by EIC); not impair usage of classification
Total bacteria	100	300	1,000	5,000	
Fecal bacteria	0	60	200	1,000	
pH RANGE	Not harmful to humans, animals, or aquatic life	6.0-8.5	6.0-8.5	6.0-8.5	Not impair usage of classification
THERMAL	Not harmful to humans, animals, or aquatic life	Not harmful to fish or oth r aquatic life			Not impair usage of classification
RADIOACTIVE MATTER	Only what occurs from natural phenomena	Discharge not to raise nuclide concentrations above standards established by USPHS as acceptable for drinking water			Not harmful to human , animals or aquatic life, or result in radionuclide concentrations in edible fish or other aquatic life rendering them dangerous for human consumption.
SEWAGE AND WASTE DISPOSAL	Prohibited	No disposal of sewage, industrial waste or other waste in such waters, except those treated for adequate removal of waste constituents including solids, color, turbidity, taste, odor or toxic material, such that treated will not lower the standards or alter the usages of classification, nor be injurious to aquatic life or render such dangerous for human consumption. Free from sludge deposits, solid refuse, free floating solids such as oil, grease or scum.			Same as B, C plus requirement that treated wastes not create a public nuisance (17 M.R.S.A. 2802) by creating odor producing sludge-banks and deposits.

TIDAL WATER CLASSIFICATION STANDARDS (38 M.R.S.A. 364 as amended by P.L. 1969, c.431)

CLASSIFICATION	S A	S B-I	S B-II	S C	S D
USES	All clean water usages, including water contact recreation and fishing; suitable for harvesting and propagation of shellfish, fish fish and wildlife habitat		Suitable recreational usages including water contact and fishing, harvesting and propagation of shellfish, fish and wildlife habitat, industrial cooling and process use	Recreational boating and fishing, propagation of indigenous shellfish harvested for depuration process, fish and wildlife habitat, industrial cooling and process uses	Power generation, navigation, industrial cooling, and process uses, migration or fish
MINIMUM DISSOLVED OXYGEN (parts per million)	6.0	6.0	6.0	5.0	3.0
COLIFORM BACTERIAL COUNT (per 100 milliters)					
Shellfish Areas/Non-Shellfish					
Median Coliform Bacteria	70/70	70/240	70/500	700/1,500	Not harmful to public health as determined by EIC; not impair usage of classification
Maximum any 10% of Samples	230/230	230/500	230/1,000	2,300/5,000	
Median Fecal Coliform	15/15	15/15	15/100	150/200	
Maximum any 10% of Samples	50/50	50/150	50/200	500/1,000	
pH RANGE	6.7-8.5	6.7-8.5	6.7-8.5	6.7-8.5	Not impair usage of classification
RADIOACTIVE MATTER	Not harmful to human, animal, or aquatic life or aquatic life or result in radio-nuclide concentrations in edible fish or other aquatic life rendering them dangerous for human consumption.				
THERMAL	Not injurious to edible fish or shellfish or their cultivation or propagation.				Not impair usage of classification
SEWAGE AND WASTE DISPOSAL	1. No discharge of sewage or other wastes except those which have received treatment for adequate removal or waste constituents, including solids, color, turbidy, taste, odor, or toxic materials, not lower standards or alter usage of classification. 2. No floating solids, settleable solids, oil or sludge deposits, no deposits of garbage, cinders, ashes, oil sludge or other refuse. Not injurious to aquatic life or render such dangerous for human consumption.				1. Same as SA-SC 2. Not lower classification or create a public nuisance by creation of odor-producing sludgebanks, etc.

All of this suggests the inherent inefficiency, if not total unworkability, of legislating specific standards for specific waters. The job is one for experts, able to adapt promptly to new scientific advances; not for a part-time Legislature.

Legislative specification of specific standards (e.g., pH, dissolved oxygen) and legislative assignment of classifications to specific waters is jurisprudentially unsound because of its inefficiency, ignoring any possible political influence on the decisions so made. But such influence (using the term "political" broadly) is also present.

Even when waters have been classified as to their "highest common use"[55] their purity has not been immune from violation by the demands of "economic development." Two examples of this phenomenon are the legislative lowering of certain waters in Hancock County from B-2 to unclassified for activities of Denison Mining Ltd.[56] and the now infamous Prestile Stream[57] for which the Legislature lowered the classification from B-1 and B-2 to D.[58]

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55. See p. 427.

56. P.L. 1963, c.420, §2.

57. See Graham, Frank Jr. That Mess On The Prestile, American Heritage Vol. XXI No. 2, February, 1970, p.106.

58. P.L. 1965, c.42. Certain portions have subsequently been reclassified to C. (P.L. 1967, c.18). This was not the first lowering of the classification of the Prestile. In 1959, the Maine Supreme Court had ruled that a similar lowering of classification did not violate the Boundary Waters Treaty between the United States and Canada (Opinion of the Justices, 155 Me. 141,152 A.2d 173 (1959).).

LICENSE PROCEDURE

The procedure for obtaining a license for a new discharge of pollutants includes public hearings upon the application and a determination by the Environmental Improvement Commission that the proposed discharge, either of itself or in combination with existing discharges, will not lower the classification of the receiving body of water or the classification which the Commission expects to recommend for unclassified waters. The Commission may place reasonable terms and conditions with respect to the discharge on any license so granted.[59] The quality of very few of Maine's waters at present meets classification standards. While the EIC cannot demand compliance until 1976, it does have the discretionary power to deny a license for a discharge which would further pollute a stream already below classification.[60] The EIC has not always done so but like the Legislature, has on occasion been inclined to give an industry of even marginal economic benefit to a community a license to discharge.

ENFORCEMENT[61]

Each Legislature brings a new change in the details of enforcement procedure. In general, however, enforcement responsibilities are

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59. 38 M.R.S.A. 414 as amended by P.L. 1969, c.499 §10. Prior to the 104th Legislature, conditions could be placed only on licenses for discharge into fresh waters.

60. See Maine Times, October 10, 1969, p.2.

61. See 38 M.R.S.A. 451-4 as amended by P.L. 1969, c.422, 431, 499.

divided between the EIC (as the initiator) and the Attorney General (as an enforcer).

Commission Enforcement Orders

Under §451, the EIC can call a hearing on any alleged violation of the water pollution statutes; after notice and hearing, the EIC may issue an appropriate order. Under the same general procedure, EIC may issue orders implementing or accelerating the statutory timetable, and resolving various other matters. Since EIC orders are appealable (§415), they presumably are final (assuming jurisdiction) if not appealed. Although its members have expertise, the Commission is limited in the number of cases it can handle, inasmuch as it meets only twice a month. (The Commission is composed of part-time members who are compensated a nominal $10 a day for meetings or hearings and receive expenses, but earn their livelihood elsewhere.)[62]

EIC orders are not self-implementing. Even if the order is to cease and desist from a specified violation, there is no automatic penalty imposed on a violator who has, after the violation came to EIC's attention, been adjudicated by EIC to be in violation. Actual enforcement of the statute is effected against the recalcitrant pollutor only by court action, which is available.

Civil Liability

There is statutory civil liability for various pollution violations; injunctions and damages may be available. The express provisions of the

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62. 38 M.R.S.A. 361 as amended by P.L. 1969, c.499.

statutes giving rise to civil liability are:

38 M.R.S.A. §416, Para.3 (deposits of wood products, petroleum products):
Liability to the State for EIC's expenses incurred in removing petroleum products illegally discharged.

38 M.R.S.A. §416, Para.4:
EIC may apply for injunction to abate conditions inconsistent with §416.

§451, Para.13* (3rd from last para.):
Attorney General's action [for injunction] enforcing EIC order. Note:that this is conditioned on EIC having previously issued an order, after hearing, pursuant to subsection 2 of §451.

§451, Para.14* (next to last para.):
As above, except that in lieu of EIC order after hearing, there may be an EIC determination of substantial and immediate danger which allows immediate injunctive action by the Attorney General without recourse to a EIC order.

§453, Para.2:
Liability to State for costs and expenses of tracing source of pollution, and eliminating or alleviating its impact; action by Attorney General for State.
Note: If the discharge is protected by the statutory time schedule from criminal prosecution, it is also protected from civil action for expenses under this provision.

§454
In event of any violation of the water pollution laws, or any orders of EIC, Attorney General may sue for injunction against further violation.

In addition, the statute preserves certain common law remedies:

§372 (Savings clause):
Neither statutes or EIC license limits State power to abate public nuisances (a public action to be brought by Attorney General);
License from EIC not a defense to [private] action at law for damages.

Stanton v. Trustees of St. Joseph's College[63] held that "action at law" for damages which the statute specifically preserves necessarily

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63. Me. 233 A. 2d 718 (1967); See discussion of case p.461.

* Correspond to EIC compilation of laws; printed as paragraphs 14 and 15 in 38 M.R.S.A. 451 (1970 Supp.).

includes a civil action for injunctive relief against threatened irreparable injury. If the plaintiffs are entitled to bring an action at law for damages in spite of the granting of a license, long established principles entitle them to relief of an equitable nature if damages would be inadequate.[64] Perhaps of greater significance, the Court held in the same case that even though the plaintiff had participated in the Commission hearing and filed an appeal from its decision, later abandoned, the decision of the Commission was not binding on them.

Criminal Liability

In addition to the civil liability sections, the water pollution statutes impose several criminal penalties, although only by way of fine, not imprisonment:

§416, Para. 5:
Violation of any provision of §416
Fine of $25-$200.

§417 (potato dumping):
Fine of $25-$200.

§453, first para. (any violation of water pollution laws except of §416 or §417):
Fine of $200-$1,000, each day of violation, a separate offense after any time limit set by EIC.
Among the offenses covered are:
§413 - New pollution without license.
§451 Para.1 and 4 - Discharge which lowers quality of water below classification.
Failure to obey order of EIC

Rationale of Civil Plus Criminal

Injunction: Only the Attorney General may sue for an injunction to eliminate pollution, or to compel compliance with an EIC order. This is

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64. Id.

consistent with practice as to public nuisances and with the Attorney General's role as lawyer for most State agencies. Injunction is the most efficient long term weapon for persistent violators, but is not necessarily prompt, and does not compensate the State for its expenses.

Damages: Oil clean-up expenses, and the costs of tracing the source and eliminating any pollution, may be recovered in civil action. In the latter case, the damage claim might well be joined with an injunction action. Expenses of this sort are particularly important in the case of one-time, or small "nuisance" pollutors.

Criminal: The criminal law is particularly useful as a deterrent to one-time violations, and as a deterrent to the practice of "gambling" on "doing it until we get caught." When each day is a separate violation, as in §453, the odds turn against such gambles. Note that while civil enforcement is vested in the Attorney General, nothing specific is said concerning criminal prosecutions. We therefore infer that prosecutions are to be handled in the normal way for misdemeanors; the cases could be prosecuted at the county level.[65]

Total: Although the various enforcement provisions are scattered through the statute in random, incredibly ill-organized fashion, they add up to an impressive array of potential weapons against pollutors: one or more types of action which may be well adapted to the pollution problem in a particular case.

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65. State v. Giles, 101 Me. 349, 64 A. 619 (1906); See Vol. II, p.270.

Enforcement Practices

This impassive variety of legal weapons is rarely put to use against pollutors. As of mid 1969, no violator had been brought into court on a license violation. An assistant Attorney General responsible for enforcing anti-pollution laws explained the apparent contradiction as follows:[66]

> Once the State starts [or threatens to start] an action, the alleged violator starts taking measures to correct the situation; the Attorney General's office rides herd on the violator until it is satisfied that the source of the violation is eliminated. "It is not a question of the pollutor making just a token effort that will stay the course of action, but a bona fide attempt."[67]
>
> Among the factors leading the Attorney General's office to exercise this discretionary power to tolerate less than immediate compliance are technological difficulties, and the fact that pollutors are often the principal industry, the principal employer, and the largest source of tax revenue in the community.
>
> The Attorney General's office reaches an informal understanding with pollutors on a timetable for corrective measures; if the timetable is being met, the threat of an enforcement suit is accomplishing the same result as

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66. Interview with Robert Fuller, Assistant Attorney General, March, 1969.

67. Id.

> the actuality. If the pollutor becomes lackadaisical or apathetic in attending the problem, the course of court action is accelerated; if any pollutor fails to meet a step on the timetable, then the shield of immunity is removed.[68]

Considering the dearth of cases, either this method is extraordinarily effective,[69] or the informal timetable is relatively flexible. If specific agreements are being reached, it would seem possible to incorporate them into a consent degree (a device frequently used at the federal level) so as to facilitate prompt action if the agreement is breached.

Even assuming that these informal procedures have optimum effectiveness against the immediate violator, the procedure adopted by the Attorney General destroys any deterrent effect which the statute might have. His practice constitutes a public notice to other pollutors that they, too, will suffer no serious consequences if they hold off correcting their pollution until they are caught and backed to the wall.

This is the poorest possible enforcement policy for an economic offense, and is explicable only if the Attorney General has inadequate personnel, or has doubt as to the validity of the statute.

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68. Id.

69. See Maine Times, November 14, 1969, p.24 for specific examples of the effectiveness of the Attorney General's office in obtaining compliance short of courtroom confrontations.

Some efforts toward judicial enforcement have been doomed by EIC's failure to comply precisely with statutory procedures, coupled with the doctrine of strict construction of statutes in derogation of the common law. In Water Improvement Commission v. Hastings[70] the complaint was dismissed because the EIC had failed to issue a cease and desist order before seeking an injunction to prevent defendant from discharging untreated human waste into a brook classified as B-1. Even though the complaint was signed by the Attorney General, it was held that inasmuch as the Commission, not the State, was the plaintiff, without the prior order the action was premature. The action could not be considered a proceeding instituted by the Attorney General to abate a public nuisance[71] since there was no allegation of nuisance. In Water Improvement Commission v. Morrill,[72] the judicial proceeding again failed to prohibit pollution because the order of the Commission was directed to a building rather than a person or corporation; and the statute authorized the Attorney General, but not the Commission to institute injunctive proceedings.

This failure of the Commission to comply with its own statute should decrease as the Attorney General's office gains greater familiarity with the law. But the haphazard drafting of the statute makes analysis of the statute and its procedures a formidable challenge.

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70. Me. 231 A. 2d 436 (1967).

71. 38 M.R.S.A. 372.

72. Me. 231 A. 2d 437 (1967).

INDUSTRIAL SITE LOCATION

Two major acts at the Special Session of the 104th Legislature materially increased the powers and responsibilities of the Environmental Improvement Commission.[73] The first was the Coastal Conveyance of Petroleum Act[74] which will be discussed under the Oil Pollution section of this chapter.

The second was An Act to Regulate Site Location of Development Substantially Affecting Environment.[75] The latter bill requires that any commercial or industrial development (1) which requires a license from the Environmental Improvement Commission to discharge pollutants into a waterway, or (2) which occupies a land area in excess of 20 acres, or (3) which contemplates drilling for or excavating natural resources must notify the Commission of its intent and the nature and location of such development.

> The commission shall approve a development proposal whenever it finds that:
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> 1. Financial capacity. The proposed development has the financial capacity and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies.

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73. Authorization for the Commission to employ a director was given by the 104th Legislature. (38 M.R.S.A. 361 as amended by P.L. 1969, c.499).

74. P.L. 1969, c.572. See p.624 this volume for full text and Chapter 8.

75. 38 M.R.S.A. 481-488 as added by P.L. 1969, c.571. See p.623 for full text; Chapter 10 for discussion.

2. Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.

3. No adverse affect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.

4. Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking.[76]

Permission may be granted on such terms and conditions as the Commission deems "advisable to protect and preserve the environment and the public health, safety and general welfare."[77]

We have elsewhere noted the questionable nature of ad hoc land use control, not based on a comprehensive plan. To the extent that EIC may deny a license on the basis of pollution control alone, this would seem to pose no problem. But absent a plan, any effort by EIC to protect the environment generally, including its aesthetic values, might have serious problems.

MUNICIPAL REGULATION OF POLLUTION

Municipalities have a role, albeit a limited role, in monitoring or eliminating pollution and litter under the general police power by the enactment of ordinances. Municipal zoning may indirectly regulate pollution by the regulation of land use -- particularly population density.

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76. 38 M.R.S.A. 484 as added by P.L. 1969, c.571.

77. Id.

Examples of direct pollution measures include an ordinance of Boothbay Harbor prohibiting any

> person dumping or disposing of any refuse or garbage upon any shore or in the harbor upon any waters adjacent to the town within one half mile from the nearest point of land, provided that this section shall not apply to duly located sewage systems.[78]

Under Port Regulations for Boothbay Harbor there is a prohibition against depositing

> any gas or oil or bilge water containing same, ashes, dirt, stones, gravel, mud, logs, plants or any other substance tending to obstruct the navigation of such harbors or waters,...or to pollute the water thereof...[79]

and the ordinance against dumping or disposing of any refuse or garbage on the shore.[80] The maximum fine for the breach of these ordinances is severely limited,[81] although industrial pollution could be significantly deterred by making each day's violation a separate offense. Similar ordinances are found in other coastal communities.

WHAT PRICE CLEAN WATER?

"Environmental control and any clean-up will not come quickly or cheaply in Maine."[82]

Enforcement under the classification system has been extremely lax. One reason is that the Commission charged with the pollution abatement program (i.e. the EIC) has, from the very beginning, been poorly staffed,

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78. Ordinance of Town of Boothbay Harbor, April 1, 1954, Article 4 (3).

79. Id. Article 12 (7).

80. Id. Article 12 (8).

81. 30 M.R.S.A. 2151 (5G), the State statutory authorization for municipal ordinances provides "a penalty of not more than $100 (Cont'd).

but even more important, poorly funded. It should be noted, however, that as a direct result of public awareness, appropriations to the commission have gradually increased from the nominal $400 appropriated for 1941,[83] $28,059 for 1955, $93,000 for 1961, to the still inadequate but more realistic sum of $199,030 for 1969.[84] Since pollution tends to be cumulative, an enforcement dollar has more impact than a clean-up dollar. But it is also true that moneys appropriated by both Federal and State governments for the purpose of assisting municipalities in their clean-up efforts, have been grossly inadequate when compared to the job that lies ahead.

In 1956, the 84th Congress offered financial assistance to municipalities for the planning and construction of sewage treatment facilities, covering up to 30% of actual cost.[85] In 1957, the State Legislature, following the federal lead, authorized the State to match such federal grants in amounts covering 20% of cost,[86] and $1.8 million dollars was appropriated for the years 1960-64 pursuant to this legislation.[87] The

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81. (Cont'd)plus costs for violation of any ordinances provided for by this section."

82. Kilmister-Fuller Report, p.C-1.

83. P.&S.L. 1941, c.209, §1.

84. P.&S.L. 1953, c.145; P.&S.L. 1959, c.161, P.&S.L. 1967, c.154.

85. United States P.L. 660, 70 Stat. 498 (1956).

86. P.L. 1957, c.388.

87. 1960 ($310,000), 1961 ($310,000), P.&S.L. 1959, c.161;
1962 ($315,000), 1963 ($315,000), P.&S.L. 1961, c.164, 200;
1964 ($565,000), P.&S.L. 1963, c.168.

percentage of matching funds which could be granted by the State was raised, in 1968[88] to 30% (35% if part of a sewage treatment system was designed to serve two or more municipalities).[89] In 1964, a $25 million dollar bond issue was authorized to provide matching funds.[90] The 1966 Clean Water Restoration Act[91] authorized substantial amounts of Federal money to help communities pay the cost of abiding by the standards required under the 1965 Water Quality Act.[92] In fiscal 1968, Maine received $1,825,000 for sewage plant construction, as compared with the original authorized $3,119,000; in fiscal year 1969, Maine's appropriation was $1,865,000 opposed to an authorized $4,452,000.[93] Because the State is reluctant to spend money which generates no federal funds, only $12.1 million dollars, out of the original $25 million dollar bond authorization had been allocated by 1967.[94] In response to this problem the State Legislature, in 1968, authorized the Commission to advance, in addition to the 30% State share, an additional 30% in anticipation of reimbursement from the Federal government.[95] In 1969, this act was implemented

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88. P.L. 1967, c.538.

89. Id., provided such project is not eligible for assistance under 8(f) of P.L. 660, 84th Congress as amended.

90. P.&S.L. 1963, c.235.

91. United States P.L. 89-753, 80 Stat. 1246 (1966).

92. United States P.L. 89-234, 79 Stat. 903 (1965).

93. Maine Times, August 15, 1969, p.11.

94. 1965 ($700,000); 1966 ($1,300,000); 1967 ($2,500,000); P.&S.L. 1965, c.129. 1968 ($3,125,000); 1969 ($4,450,000); P.&S.L. 1967, c.159.

95. P.L. 1967, c.538, §2.

by the authorization of a $50 million dollar bond issue.[96] Recently, it was announced that Maine will receive $4,981,500 from the Federal government in 1970, instead of previously allocated amounts of less than $2,000,000.[97]

The engineering firm of Edward C. Jordan, Co. has estimated that $300 million dollars is required for a comprehensive program of water pollution and sewerage control.[98] Current estimates indicate that in excess of $50 million dollars will be required in the Greater Portland Area alone.[99] The people of Maine have recently ratified a $50 million dollar bond issue for pollution control. The Federal matching share of the $300 million would amount to approximately $100 million, if and when appropriated. Municipalities are already committed to substantial expenditures for pollution control. It would seem probable that vigorous enforcement of anti-pollution laws would induce at least a corresponding expenditure by industry.

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96. P.&S.L. 1969, c.181.

97. This may be compared with the figure of $73.6 million estimated to be needed by Maine to cover its five year program for water pollution abatement. (Portland Press Herald, January 31, 1970, p.3).

98. Maine Water Resources Plan, E.C. Jordan, Co., February, 1969, Vol. I, p.14.

99. Id. at p.91.

II COMMON LAW AND POLLUTION

Before the advent of the water classification standards and licensing procedures discussed above, judicial relief for pollution was limited to the common or statutorily defined law of nuisance,[100] or based on common law rights arising from riparian ownership. These remedies are still available and pollution may sometimes be abated by this type of action, when an action cannot be successfully maintained under a water classification or license violation.

Navigation and Public Nuisance

As stated in Chapter Three, an action for the abatement of a public nuisance may only be brought by the State, unless a member of the public can show he has suffered peculiar damages.[101] If a waterway is polluted to such an extent that it interferes with navigation, then the interference is such a nuisance. It is partially under this theory that the Army Corps of Engineers is now pursuing certain pollution cases in New York State: sedimentation from the pollutors is obstructing navigation.[102]

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100. Simpson v. Seavy, 8 Me. 138 (1831); Washburn v. Gilman, 64 Me. 163 (1873); Gerrish v. Brown, 51 Me. 256 (1863); Kennebunk Water District v. Maine Turnpike Authority, 145 Me. 35, 71 A. 2d 520 (1950). See also R.S. Ch.164, §1, 1841. In Texas Gulf Sulphur Co. v. Portland Gas Light Co., 57 F. 2d 801 (1st Cir. 1932) cert. denied 287 U.S. 601 (1932) it was held that defendant was liable under P.&S.L. 1909, c.301 which specifically prohibited the throwing of any ashes into waters of Portland Harbor. Even though this statute was found in the Special Laws of Maine, it was held to be of public and general character and applicable to all persons. "There is no restriction of locality which prevents it from being public and obligatory on all citizens."

101. See Vol. II, p.262 et seq.

102. New York Times, January 15, 1970, p.1. See 1899 Refuse Act (33 U.S. C.A. 407).

Since navigation is a public right, a private person may bring an action for interference with navigation only where the interference has worked an inconvenience on him that is not shared to the same degree by the general public. In Franklin Wharf v. Portland,[103] the outfall of a municipal sewer which filled up the flats adjoining plaintiffs wharf was held to be both a public and a private nuisance. The Court held that the deposit was a private nuisance because the plaintiff was peculiarly damaged in being denied the rights to have the water at his dock at its natural depth, and thus the right to normal ingress and egress. The Franklin case cited Haskell v. New Bedford[104] to the effect that "the owner of land bordering upon the sea, may lawfully throw refuse matter into it, providing he does not create a nuisance to others. Judicial sanctioning of municipalities using the ocean for sewage has also been evident.[105]

Because of the Colonial Ordinances and the public servitude on the shore, the riparian owner of property on tidal water has usually been able to recover damage for pollution only if such pollution affects access to his property.

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103. 67 Me. 46 (1877).

104. 108 Mass. 208, 214 (1871).

105. See Atwood v. Bangor, 83 Me. 582, 22 A. 466 (1891) which held that the city had the right to extend the municipal sewer over plaintiff's flats to a point below low water mark; and that the city would be liable only for the improper construction or maintenance of the sewer.

FRESH WATER STREAMS

> "A river is more than an amenity, it is a treasure."--Justice Holmes.[106]
>
> All watersheds affect our coast.[107]
>
> To protect the delicate ecological balance of its coastal estuaries and enhance the economic values of its coastal areas it is obvious that coastal water resources planning should receive an emphasis commensurate with that given inland waters. It is equally apparent that coastal waters cannot be considered by themselves but are directly related in flowing rivers, streams, and runoff from coastal land areas.[108]

To fully evaluate the common law legal principles pertaining to pollution in salt water, it is necessary to consider applicable principles pertaining to pollution in all rivers that lead to the sea. This in turn necessitates a consideration of the nature of public and private rights in the discharge of domestic, agricultural, or industrial waste into Maine's fresh water rivers. Our survey of the law in this area has not been exhaustive, but is restricted to those aspects that have a direct bearing on marine resources.

Riparian v. Non-Riparian Uses

The common law of Maine is said to embrace the English rule of "natural flow" under which each riparian landowner has the right to have the water flow past his land substantially undiminished in quantity

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106. New Jersey v. New York, 283 U.S. 336 (1930).

107. Ronald Speers, Commissioner Inland Fisheries and Game, at Environmental Task Force hearing, Augusta, November 7, 1969.

108. Vol. I, State Water Resource Planning, p.32.

and unimpaired in quality. Strictly applied, the natural flow rule is almost completely unworkable for it would keep riparian owners from using any water for industrial, agricultural, or domestic purposes. As Chancellor Kent observed this "would be unreasonable and contrary to the universal sense of mankind..."[109]

The name of the doctrine is as non-utilitarian as its strict application. In fact, as the cases summarized below will demonstrate, Maine water law draws one basic distinction, between riparian and non-riparian uses; and the outcome of a case will depend on which uses are competing. Maine doctrine may be summarized as follows:

1. As between a riparian and a non-riparian use: The riparian use will win, whether upstream or downstream from the competing non-riparian use. This result seems to follow regardless of the relative utility of the two uses, and regardless of the reasonableness (in fact) of the non-riparian uses.
2. As between two riparian uses: There will be a balancing of utilities and relative hardship for any non-domestic use; that use which the court finds to have the greater utility, if it does not "unreasonably" burden the other use, will win.

For domestic uses, a riparian may exhaust the water supply altogether and not merely diminish it. For non-domestic uses on or in connection with riparian land, all riparians are said to have correlative rights.

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109. 3 Kent Commentaries 440 (2d Ed. 1832). See Discussion Hanks, The Law of Water in New Jersey, 23 Rutgers L. Rev. 621 629 (1968).

The cases seem to hold that no right whatsoever exists to use water for purposes unconnected with the land, or to use water on non-riparian land. Thus a diversion off the riparian land; or use of the stream for effluent originating on non-riparian land, is actionable per se on complaint of a lower riparian. The complainant may obtain injunctive relief for the technical violation of his right; otherwise, the defendant's admittedly non-injurious use might ripen into a prescriptive right.[110]

The early Maine case of Blanchard v. Baker,[111] held that a diversion of water which was not returned to the stream was actionable even though there were no actual damages; the Court said, however, that a riparian owner has the right to avail himself of a river's momentum for power; he may also make a reasonable use of the water itself for domestic purposes; for watering cattle, or even for irrigation purposes if it is not unreasonably detained or essentially diminished.[112]

In Lawrence v. Lockwood[113] the Maine Supreme Judicial Court said "For domestic, agricultural and manufacturing purposes, to which every riparian owner is entitled, there may be consistent with that right, some diminution, retardation, or acceleration of the natural flow" In the Lockwood case the Court resolved competition between two industrial

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110. Hanks, 23 Rutgers L. Rev. 628 et seq.

111. 8 Me. 253 (1832).

112. Id. at p.266.

113. Lockwood v. Lawrence, 77 Me. 297 (1885).

uses[114] by two large factories operating on the banks of the Kennebec River. The lower riparian owners sued for an injunction against the upper riparian owners depositing waste material into the river which prevented proper operation of plaintiff's factory. The Supreme Judicial Court stated the relative rights of riparian owners as follows:

> Every proprietor upon a natural stream is entitled to the reasonable use and enjoyment of such stream as it flows through or along his own land, taking into consideration a like reasonable use of such stream by all other proprietors above or below him. The rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with first regard to the like reasonable use by all others who may be affected by his acts. Any diversion or abstraction which substantially and materially diminishes the quality of water, so that it does not flow as it has been accustomed to, or which defiles and corrupts it so as to essentially impair its purity, thereby preventing the use of it for any of the reasonable and proper purposes to which it is usually applied is an infringement of the rights of other owners of land through which the stream flows, and creates a nuisance for which those injured are entitled to a remedy.[115]

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114. 77 Me. 297 (1885). The Lockwood case involved a textile company in Waterville employing more than 1,000 persons whose operations were hindered by refuse material, sawdust edgings, shavings, and other debris discharged from defendant's saw mills at upstream locations. The lumber company employed their labor and capital through the whole valley of the Upper Kennebec and its tributaries. Its operations preceded by many years the establishment of the textile plant. The textile plant averred that they were entitled to the "natural flow of the river, and to have it come to their factories in its natural purity." (p.302). The Court spoke to the problem of economic interests, the problems of determing liability when several pollutors contributed to the aggregate level of pollution, and the resultant liability. In allowing an injunction against one saw mill because the pollution attributable to this source was ascertainable and denying it against another because it could not be ascertained that its pollution was responsible, the Court said:
> And we are equally satisfied that, while it is of great convenience for them to dispose of their waste, and considerable expense and great inconvenience would be occasioned by any other disposition of it, it is not absolutely necessary to the operation of their mills that it should thus be deposited in the stream. (Id. at p.319).

115. Id. at p.316.

Obviously, the reasonableness of any particular use or the amount of water which may be diverted for consumptive use cannot be accurately ascertained in advance. It requires the qualitative balancing of two variables. That is, the use of one riparian proprietor is not unreasonable as to another riparian proprietor's use until the harm to one outweighs the utility to the other. The riparian proprietor who values his watercourse for its aesthetic or recreational qualities alone will find it difficult, if not impossible, to convince a Court that a riparian factory's use of the same waters, which may substantially affect water quality or quantity, is unreasonable. An examination of the condition of many of Maine's non-tidal rivers and streams would suggest that Courts have had the tendency to find reasonable that which is profitable.[116]

Even if the use of an upper riparian owner is unreasonable as against a lower riparian owner, the right to such use may be obtained by prescription, or eminent domain. Conversely, a lower riparian owner's will rarely if ever give use to a cause of action in an upper riparian owner nor a presumptive right as against him, since no right of the upper riparian owner is normally invaded by downstream use;[117] although a dam illegally backing up water on the upstream land is an obvious exception.

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116. But see Berman v. Parker, 348 U.S. 26, 33 (1954); Namekagon Hydro Co. v. Federal Power Comm., 216 F. 2d 509 (7 Cir. 1954); Scenic Hudson Preservation Conference v. F.P.C., 354 F. 2d 608 (2nd Cir. 1965); Udall v. F.P.C., 387 U.S. 428 (1967) (High Sheep Mountain case.).

117. Crosby v. Bessey, 49 Me. 539 (1860); Masonic Association v. Harris, 79 Me. 250, 255, 9 A. 737 (1887); Lockwood v. Lawrence, supra; Kennebunk Water District v. Maine Turnpike Authority, 147 Me. 149, 84 A. 2d, 433 (1951).

Unreasonable As A Matter Of Law

The Lockwood case, a competition between riparian uses, should be contrasted with another pollution case, Kennebec Water District v. Maine Turnpike Authority.[118] The Water District sought to recover damages for injury to its claimed property right to take water from a brook for public distribution; it claimed that the defendant constructed its turnpike across the brook in such a way that the water was rendered so turbid as to be unfit for distribution. The Court mentioned the rule laid down in Lockwood, that "the rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with just regard to the like reasonable use by all others who may be affected by the acts;"[119] but held that "reasonable use" means reasonable riparian use, while a non-riparian use is unreasonable as a matter of law; and it further held that diversion of water by a public water company for sale to the public is not a riparian use and therefore (unless acquired by purchase or grant) cannot prevail against either upper or lower riparian proprietors.[120] Considering the public interest in pure water supplies, the outcome is appalling, if logical.

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118. 145 Me. 35, 71 A. 2d 520 (1950); 147 Me. 149, 84 A. 2d 433 (1951).

119. Id. at p.44.

120. Id.

> Whether or not the [riparian owner] was making a reasonable use of the waters of the brook depends not only upon the use which it was actually making of the same but also...upon whether it was using the same for a proper purpose and in the kind of business to which the stream was subservient. unless the [riparian owner] had the legal right, that is, the proprietary right, to use Branch Brook as a source of public water supply, its use of water therefrom for such purposes was neither a proper one nor was it a use (Cont'd)

In 1969, the case of Stanton v. Trustees of St. Joseph's College[121] carried the line of reasoning begun in Blanchard v. Baker,[122] and developed in the Water District cases to its ultimate conclusion. The private college, located at some distance from a non-navigable brook, proposed to build a new dormitory which would necessitate the emission of 50,000 gallons of liquid residue per day. The College acquired a small parcel of land adjacent to the brook as well as easements permitting it to lay sewer pipes from the dormitory site to the riparian parcel, to discharge into the brook. The effluent was to be treated so as to leave the quality of the water virtually unchanged while only slightly increasing its quantity. The proposed discharge of effluent had been licensed by the Environmental Improvement Commission.

The Court held that the plaintiffs, downstream riparian proprietors, had a right to have the waters of the stream unchanged in quantity or quality except by reasonable riparian uses of other riparian owners; that riparian uses are only those uses of water which benefit adjacent

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120. (Cont'd) to which the brook was subservient. Reasonableness of its use depends upon its legal right to exercise the same. (Id. at p.45)
If the use exercised by a riparian proprietor be a riparian use, the right to exercise it was acquired as a usufructuary right growing out of and annexed to the ownership of the riparian land. If, however, as here it be a non-riparian use, the right to exercise the same must be acquired by purchase or grant from, or by the exercise of the right of eminent domain against those whose rights it is sought to restrict by the exercise of such use. Unless so acquired, the non-riparian use will not be a reasonable use against either upper or lower riparian proprietors... (Id. at p.51-2)

121. Me. 254 A. 2d 597 (1969).

122. 8 Me. 253 (1832).

land; that the waste disposal use contemplated by the college, not being for the benefit of the small riparian parcel, was not a riparian use, and thus was unreasonable as a matter of law. The Court took note of the license issued by the Environmental Improvement Commission, but held that the agency was incompetent to rule on rights as between private individuals.

The Court flatly refused to follow the rule adapted by the Massachusetts Court in Stratton v. Mt. Hermon Boys' School[123] which stated that:

> A proprietor may make any reasonable use of the water of the stream in connection with his riparian estate and for lawful purposes within the watershed, provided he leave the current diminished by no more than is reasonable, having regard for the like right to enjoy the common property by other riparian owners. If he diverts out of the watershed or upon a disconnected estate the only question is whether there is actual injury to the lower estate for any present or future reasonable use. The diversion above without evidence of such damage does not warrant a recovery even of nominal damages.[124]

The decision in the St. Joseph's case was an unfortunate one. By giving the riparian owner injunctive relief when there was no actual harm to the quality of the water and only a slight augmentation of the quantity, the Court placed technical private rights above the public interest in sewage disposal. The fallacy is emphasized by the fact that the EIC had approved the discharge. The case will prove to be a stumbling block in any State effort to manage its water resources.

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123. 216 Mass. 83, 103 N.E., 87 (1913).

124. Id. at p.88-89. This is the only Maine case which takes into account the term "watershed" in determining reasonable use. The analysis is borrowed from the Mt. Herman Boys' School case, supra.

Reasonable Use

Most American states have a rule differing from Maine's in two major respects. First to maintain an action, a complainant must show that he will actually suffer damage if the defendant continues his use. Since non-injurious use does not give rise to a cause of action, such use cannot ripen into a prescriptive right. Second, the diversion of waters to non-riparian land is not illegal, provided that it meets the tests of reasonableness. Reasonableness was defined as early as 1883 in the leading Minnesota case of Red River Roller Mill v. Wright.[125] In determining reasonableness, social and economic values of competing uses must be balanced; the condition of the stream, size of the watershed, the season, the amount of water withdrawn and the amount returned all have to be taken into consideration.[126]

The language of "reasonable use," and the reasoning that is used to determine what is "reasonable," is used in Maine to balance competing uses as between riparian owners, both of whom are using the water in the service of riparian land.

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125. 30 Minn. 249, 251; 15 N.W. 167, 169 (1883).

> In determining what is a reasonable use, regard must be had to the subject matter of the use; the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the Country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the Country in similar cases; and all the other and ever varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration.

126. 23 Rutgers L. Rev. 268.

Who Is A Riparian Owner?

To be entitled to the use of the water, one must be a riparian owner. A riparian owner is one whose land extends beyond the water's edge to some portion of the river bed.[127] How much back land may be considered riparian land has not been adjudicated, but the second St. Joseph's case[128] would suggest it must be in the same watershed. Unless otherwise stipulated or detached by previous grant, a grant of land contiguous to the water on fresh water streams carries ownership to the thread of the stream.[129]

III TYPES OF POLLUTION

SANITARY SEWAGE AND TRASH

Major contributors of pollution Maine are municipalities[130] that dump untreated sanitary waste and untreated industrial waste directly into surface waters. Public sewers exist in only 121 of over 400 Maine communities and the number of secondary treatment plants or their equivalent is only 16. Some of these give treatment to only a portion of the

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127. Wilson v. Harrisburg, 107 Me. 207, 77 A. 787 (1910); Stone v. Augusta, 46 Me. 127 (1858). See Vol. II, p.205.

128. Stanton v. Trustees of St. Joseph's College, Me. 254 A. 2d 597 (1969).

129. See Vol. II, p.225 et seq.

130. It has been estimated that municipalities are responsible for 10 per cent of all pollution in Maine. (Figures based on projection that industrial pollution is equivalent to a population of nine million according to Stanley R. Goodnow of the E. C. Jordan Co.)

total effluent.[131] The largest city in Maine does not have even a primary treatment plant. Tertiary treatment plants are in the future. Outfalls for municipal sewers need not be corrected until at least 1976. Strict enforcement of the law against municipalities that are not meeting water classification standards by that time is unlikely if federal and State financing have not been forthcoming in sufficient time and amount.

The need for regional consideration of sewage disposal is reflected in the requirement that there must be a comprehensive plan for sewage facilities to secure federal financing, and an additional 10 per cent if the plan is approved by a metropolitan or regional planning group.[132] This requirement has been met in Maine largely through regional planning commissions;[133] presumably, Council of Governments[134] will fulfill the same function. The Maine Legislature has also facilitated two or more municipalities forming sanitary districts to develop and maintain sewage systems.[135] The State Plumbing Code is hardly relevant since it deals only with the input into sewer systems and waste disposed by septic tanks. The new requirement of a 20,000 square foot minimum lot size for the construction of dwellings on land not serviced by a sewer should retard the

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131. Vol. I, Maine Water Resource Plan, p.58.

132. Water Pollution Control Act Amendments of 1956, P.L. 84-660, 70 Stat. 499 (1956), 33 U.S.C.A. 446d; Water Quality Act of 1965, 79 Stat. 903 (1965).

133. 30 M.R.S.A. 4501-5 as amended by P.L. 1969, c.382, §2.

134. 30 M.R.S.A. 1981-6 as added by P.L. 1969, c.382, §5.

135. 38 M.R.S.A. 1061-1067 (Supp.).

136. 12 M.R.S.A. 4801-6 as added by P.L. 1969, c.365; 12 M.R.S.A. 681-9 as added by P.L. 1969, c.494.

rate of increase of water pollution from housing developments in or near water.[136]

Aside from health considerations, it is necessary to consider the process known as eutrophication. Nutrients from even disinfected sewerage, whether passing into lakes or waterways by seepage or from a treatment plant, may cause the accelerated growth of algae. The growth of algae in turn takes up the oxygen in the waters and the algae dies. As the process is repeated, the lake or body of water gradually fills up with decaying vegetation. The problem of eutrophication has not been pronounced in tidal estuaries and coastal zones in Maine to date because of the flushing action of the tide. Reports off the California coast and Long Island,[137] however, should provide the necessary handwriting on the wall.

Another source of "people pollution" is the growing number of pleasure boats which discharge gas and oil as well as sewage. While it is theoretically against the law for a person to discharge from a boat what he might with impunity discharge through a municipal sewer, the policing of this activity is relatively difficult.[137a]

Economic Value to Sewage?

Although the thought of recycling waste has been advanced through the space program, there is no practical technology for recycling sewage. At the moment, the most economical use that could be made of sewage is

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137. "Long Island Sound is becoming another Lake Erie," Ogden D. Reid, Congressman, Westchester Co. quoted in New York Times, Oct. 25, 1969, p.31.

137a. See Conference Report: Water Quality Improvement Act of 1970, March 24, 1970.

as nutrients for acquaculture. In addition to overcoming the psychological barrier for such utilization, there are legal barriers. The authorization of depuration plants for reclaiming clams from mildly polluted areas is an indication of the possibility.[138]

THE CONTROL OF TRASH

State

Regulations as to the disposal of trash and litter are spelled out in the statutes on nuisances;[139] a special section on dumping litter on highways includes a prohibition against depositing such debris on public, bathing places or in tidal waters.[140] Mention has been made previously of a pictorial presentation of the degradation of the Maine coast by litter.[141]

Several communities in Maine have recently been approached to become repositories of waste material from other parts of New England, either to be placed on the land or used as land fill. There are real health hazards and pollution problems which might be a consequence of such activity. Recently the town of Wells at a special town meeting passed an ordinance to prevent outside use of their land as a dumping ground. The town manager has warned the community that they should not be complacent

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138. 12 M.R.S.A. 3452.

139. 17 M.R.S.A. 2701 et seq; 17 M.R.S.A. 2802 et seq; See p.341, 346.

140. 17 M.R.S.A. 2251 (Supp.).

141. McKee, J., As Maine Goes, Bowdoin College, Museum of Art, (1966).

because the fine of $100 could easily be absorbed by a big business.[142] A State prohibition against out-of-State dumping passed the Special Session (1970) of the 104th Legislature.[143]

Federal Control of Litter

Federal law pertaining to litter augments the State's limited capacity to prevent this type of pollution in coastal waters. The 1899 Refuse Act[144] prohibits the jettisoning of any refuse into the navigable waters of the United States without permission from the Army Corps of Engineers. This would apply to garbage, beer cans, and various assorted trash. The Corps of Engineers probably would not give permission for waste disposal likely to reappear on an incoming tide. Presumably dumping of garbage beyond the three mile limit is not prohibited under the Refuse Act. The prohibition against ocean littering is enforced by the Coast Guard. On nautical maps there are areas off Maine marked as dumping areas. These are mostly designated for fill or borrow from harbor and navigation projects.[145]

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142. Portland Press Herald, January 9, 1970, p.18. The search for dumping land has not been limited to Wells, see Portland Press Herald, November 27, 1969, p.21.

143. P.L. 1969, c.570. Complete text p.627.

144. See p.489 infra for citation and discussion of this act.

145. Interview with Captain Robert A. Lee, U.S.C.G., Commander of the Port of Portland, February 12, 1970.
Other ocean debris detrimental to fishing include shipwrecked fishing vessels (Bureau of Commercial Fisheries has listed 36 wrecks near Georges Banks) and unexploded torpedoes or shells. An area off the Maine coast is marked off limits because of this danger. The Maine fishing vessel Snoopy was destroyed by a German torpedo caught in its nets while scallop fishing off the Carolina coast. (See Doody Administrix et al. v. United States, Unpublished Opinion on file Federal District Court, Portland, Maine, February 10, 1969).

AGRICULTURAL POLLUTION

Pollution from agricultural activities is primarily attributable to fertilizers and insecticides that find their way into the waterways by seepage, runoff and erosion. Similar pollution results from salt and chemicals used on highways for snow and ice control and for defoliation. The problems of the Forestry Commission in the handling of spruce budworm, and the utilization of D.D.T.,[146] were alluded to in Vol. I, p.93. Due to the fact that shellfish are far down the food chain the run-off will produce a concentration of chemicals and pesticides in shellfish. This is particularly serious for lobster which, being biologically related to insects, are particularly susceptible to insecticides.

The creation of the Board of Pesticide Control[147] and the regulations made pursuant to the Maine Pesticide Control Law[148] have brought the attention of a specific agency[149] to bear on the problem.

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146. A Maine summer resident Rachel Carson led in alerting the United States and the world about the dangers of D.D.T. at a time when the danger of pesticides to natural resources and the marine environment was not apparent.

147. 22 M.R.S.A. 1452 (Supp.).

148. 22 M.R.S.A. 1451-65 (Supp.).

149. See Vol. I, p.79 for composition of this agency.

> An equation must be established between the need for additional power development on the one hand and the protection of the people and the environment on the other. [150]

> American consumers must be prepared to pay higher electric bills if they want environmental controls built into new power plants and transmission lines. [151]

Thermal Pollution

The comparatively recent concern over thermal pollution stems from the construction of atomic power plants,[152] one of which is being built at Wiscasset, Maine. This type of plant has also raised questions about radioactivity pollution.

Thermal pollution did not originate with atomic power; all steam electric plants, whether fired by fossil fuel (oil, coal or gas) or nuclear reactor, discharge heat into receiving waters in the process of condensing steam back into water for recycling in the plant. Most of this heat is ultimately dissipated to the atmosphere. Nuclear power differs from fossil fired power because of the vastly greater amount of heat to be dissipated in the reactor, thus triggering a new awareness

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150. Remarks made by Senator Edmund S. Muskie at a hearing of the Senate Sub-Committee on Intergovernmental Relations, February 3, 1970, (Portland Press Herald, February 4, 1970, p.12).

151. Testimony by Dr. Lee A. Dubridge, President's Chief Science Advisor, at hearing mentioned in fn.150.

152. The first nuclear power plant was built in 1957. Ten years later, there were 16 in operation, 21 under construction, 40 on order and 12 more planned. In New England alone, two plants are operating, four are being built, two are definitely planned and an undisclosed number of others are under consideration. (New England Marine Resources Information Bulletin, No. 7, December, 1969).

of all forms of thermal pollution.

The cooler the water used in the cooling process, the more efficient the operation of the plant. This fact makes location of power plants in coastal locations an economic factor in site selections. Waters of the Maine coast seldom exceed 60 degrees even in summer. An additional advantage of using sea water in Maine is the temperature differential between the warmed water discharged from the plant and the cold receiving water causes the warmed water to spread out in a thin layer over the broad surface of the cold sea water, where some 80% of the heat is dissipated to the atmosphere. The balance is then mixed and diluted with the cold water below. According to the President of Maine Yankee, the result after mixing will be that the temperature increase of the mass of water will be very small -- less than one degree in the case of Maine Yankee.[153] The temperature of cooling water leaving a plant is about 15 to 25 degrees higher than when it entered.[154] In terms of significant degrees of heat added, nuclear plants do not raise condenser cooling water temperature any more than conventional fossil fuel plants.[155] This

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153. Speech of President of Maine Yankee, W.H. Dunham, reported in the Natural Resources Council Bulletin, June, 1969.

154. Our Nation and the Sea, Panel Report, Vol. 1, p.III-52.

155. For example the temperature rise of condenser water at Central Maine Power Company's Mason and Wyman Steam Plants is about 24 degrees. Maine Yankee water temperature, at full load will be only one or two degrees warmer. (Address by Mr. Dunham, See fn. 153 above.) The difference is that nuclear stations, because of their design, give off larger volumes of warm water, but not significantly warmer water. (Id.)

is, of course, largely irrelevant since it is the total heat to be dissipated into the receiving waters in a given period -- measured, for example, in BTU's -- which will determine the effect on those waters.

Even though a plant is situated on the coast, it still must be on or near a source of fresh water to be used in its boilers. Thus, in addition to heat in the ocean, thermal pollution is also evident in the estuaries. "Everybody knows"

> Changes in water temperature, particularly sudden, extreme changes, affect everything living in the marine environment. Even if the temperature rise is not great enough to kill fish outright, it is known to affect their metabolic rate and alter, among other things, feeding, growth and reproductive patterns as well as preventing normal development of eggs. Fishes are the more conspicuous members of a finely-balanced ecological system that includes both plant and animal inhabitants of rivers and estuaries. Each of them has a vital place in the food chain and damage to any upsets the entire system. Ecologists and biologists believe that unlimited dumping of hot water can make a river uninhabitable by its normal population and eventually unusable by man.[156]

In addition, higher water temperatures accelerate the growth of aquatic algae and vegetation, and may prevent the production of game fish and other species. High temperatures, even if not lethal, may be a barrier to necessary movement of migrant species of fish.[157]

Except at extreme ranges, no one is quite sure what the effects of thermal pollution will be. There are some that would follow the power company's terminology and term thermal discharge "enrichment" rather

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156. New England Marine Resources Information Bulletin, No. 7.

157. See Our Nation and the Sea, Panel Report, Vol. 1, p.III-52.

than pollution. Warmer water could be beneficial for aquaculture, and experimentations along this line have been carried out by the Department of Sea and Shore Fisheries off Cousin's Island. Maine Yankee Atomic Power has made a grant of $418,132 to the Darling Research Center to study the effects of thermal pollution from the Wiscasset plant, and also a grant of $200,000 to the Department of Sea and Shore Fisheries to study the aquaculture potential from this discharge. In addition, a study was commissioned to recommend how the thermal capacity from this plant might be best utilized.[158]

When a representative of Central Maine Power was asked how you decide and who should decide whether there should be fish killed if necessary to create power, his incredulous look bore testimony to the fact that the power company is vigorously endeavoring to assume that such a phenomonen will not occur. But realistically there may be times when, for the necessity of power, some portion of the coast, environment or water quality may have to be sacrificed. This is not to suggest that the need for power can excuse power companies from incurring necessary expense in constructing plants to minimize thermal pollution, but it does mean that at some point in time from an "irresistible public necessity" difficult decisions must be made. Perhaps the commandment should not be: "Thou shall not kill fish" but rather "No pollutant shall be allowed in the marine environment unless its lethal effects are known and detriment to the ecology and to the environment will be a result of a positive choice

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158. See A. D. Little Report: Preliminary Evaluation of Uses for the Warm Water Discharge from the Maine Yankee Plant. Recreational and aquaculture uses appeared promising. (Report to Maine Yankee Atomic Power Co. (August, 1969)).

based on knowledge of the consequence rather than in a reckless disregard for marine life." From an economic point of view it would be unrealistic to refrain from killing fish if these same fish were not important commercially or essential in the food chain of some fish that were. An analagous situation would be the public outcry when sea gulls are victims of oil spills juxtaposed against the statements from a biologist of the Portland Society of Natural History that the gull population is too high, and it is biologically prudent to reduce the number.[159]

Although legislation may be forthcoming, as of this writing there is no federal agency with authority to regulate thermal pollution.[160] Maine law regarding thermal pollution sets result - oriented standards.[161] Definite parameters had been included in draft legislation at the 104th Legislature,[162] but were not enacted into law. Similar legislation setting maximum temperature of receiving waters was introduced

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159. Richard Anderson. Newsletter, Feb. 1970; See also the Herring Gull-Cormorant Control Program, State of Maine Department of Sea and Shore Fisheries, 1953, Reprinted 1964.

160. The AEC, which licenses atomic plants, maintains its jurisdiction extends to radiological hazards only--a stand backed by recent Court rulings. The Federal Water Pollution Control Administration in the Department of the Interior can become involved only after a violation has occurred in an interstate waterway. The Federal Power Commission, which regulated conventional power plants, has no jurisdiction over reactors. For some time the FWPCA has been pressing the states to establish water criteria that would control all forms of pollution and, specifically to set limits on the amounts water temperatures can be raised. It has been recommended by some that the temperature of streams be raised no more than five degrees, that of lakes by no more than three. (New England Marine Resources, Information, Bulletin 7, December, 1969). See U.S. Making Initial Move Against Thermal Pollution, New York Times, February 22, 1970, p.1.

161. "...nor shall such matter or substance alter the temperature...of these waters so as to render such waters harmful to fish (Cont'd)

in the January, 1970 Special Session,[163] but again failed to withstand the legislative process. This quest for legislative certainty is misplaced, since precise temperatures would supplant the result-oriented statements; and with scientific knowledge in its infancy, only the resired result can be stated with certainty.

Radioactive Pollution[164]

The United States Atomic Energy Commission sets safety standards for radiation levels which govern atomic power plants. Radiation from nuclear power plants is well below the safety standards set by AEC , but there is concern over possible cumulative effects of long exposure to even the accepted radiation levels.[165] The Maine Legislature thus has prohibited the discharge of any radioactive substance into Class A waters; in other fresh water bodies the radio-nuclide concentrations may not exceed the United States Public Health's standards for drinking water. In all marine classifications, discharges are prohibited which would result in the radio-nuclide concentrations in edible fish or other aquatic life rendering them dangerous for human consumption.[166]

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161. (Cont'd) fish or other aquatic life." "...in such amounts or at such temperatures as to be injurious to edible fish or shellfish or to the culture or propagation thereof." 38 M.R.S.A. 363, 364 as amended by P.L. 1969, c.431.

162. L.D. 1166.

163. P.L. 1969, c.581. (See L.D. 1770, L.D. 1828).

164. Portland and Searsport are the only two ports in Maine authorized to handle radio-active cargo but none is being shipped through them. (Interview with Captain Robert A. Lee, U.S.C.G., February 12, 1970).

165. New England Marine Resources Information, Bulletin No. 7, See remarks by Commissioner of Health and Welfare, Vol. I, p.69.

166. 38 M.R.S.A. 363, 364 as amended by P.L. 1969, c.431.

INDUSTRIAL POLLUTION

WET PROCESS

Early industrial development in Maine was primarily oriented around the basic resources of water and timber. The lumber industry of the 1800's depended on the rivers to convey timber to coastal areas for shipping throughout the world. The same water resource gave rise to the textile industry which utilized the resource not only for power but also for processing. Rapid changes in technology after World War II led to the creation of a new industry in northern Maine for the processing of raw potatoes into prepared foods such as frozen french fries, potato puffs, and canned potatoes. Similar technological improvements led to the advancement of poultry production and processing in central Maine. The fishing industry historically has been significant in the economy, and the processing and canning of seafood is also a factor to be taken into account in water resource management. Recently the electronics industry has grown in Maine; shipbuilding and furniture-making have traditionally contributed to Maine's industrial base.[167]

Most of Maine's industry, therefore, is "wet process," using water in the productive process to carry off waste products. Their large amounts of waste water adversely affect the waters into which the wastes are discharged. One pulp-and-paper mill may produce organic water pollutants equal to the sewerage from a city of over 1,500,000; a poultry or potato processing plant, or a tannery may produce an organic load

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167. Vol. I, Maine Water Resources Plan, p.41.

equal to that of a city of 50,000 persons.[168]

A poultry processing plant on the Penobscot River was responsible for the outpouring of indignation quoted at the beginning of this chapter.[169] Atmospheric pollution - smells - generally coincide with water pollution by the paper industry, fish processing plants, and rendering plants which make fish meal as a supplement or a substitute for grain for poultry and live stock. Perhaps because they are not notoriously smelly, few people have appeared at hearings of the Environmental Improvement Commission to protest shrimp processing plants' disposal of waste into tidal waters.[170]

In reaction to Maine's historic involvement with the lumber industry, there are specific prohibitions in the statutes against depositing or discharging wood waste products into inland or tidal waters;[171] for a similar reason there is a specific prohibition against the depositing of

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168. Id. 41-42.

169. The Coast Guard has reported many violations of the Refuse Act in the disposal of chicken feathers on navigable waters. (Interview with Captain Robert A. Lee, U.S.C.G.).

170. See Portland Evening Express, December 18, 1969, p.1, which reported petition of a fish company to discharge 1,000 lbs. of waste a day into Portland Harbor. Of this amount, 500 lbs. would be shrimp spawn and 500 lbs. shrimp feelers. Most of the company's solid waste was to be trucked away or dumped at a farm outside Portland. The fish company could have discharged the same amount of waste through the municipal sewer with impunity. Technically, even though licensed by the Environmental Improvement Commission, the discharge would be a violation of the "Refuse Act." (Interview with Capt. Robert A. Lee).

171. 38 M.R.S.A. 416 (Supp.).

potatoes or any parts thereof into any water or watercourse or the bank of same if such deposit might tend to pollute such water.[172]

Present classification standards for marine waters contain prohibitions against deposits of sludge or solid refuse or substances which impart color, turbidity, taste or odor detrimental to the usage of the classification.[173]

Theoretically, federal money does not go directly to industry to clean up its pollution unless the money comes as a special "experimental grant," but in many instances industry receives an indirect subsidy by state and federal money appropriated for municipal sewers and treatment plants designed for or through which the effluents of a particular industry are discharged.

OIL[174]

Perhaps no single commodity has greater potential for profit or a great possibility for destruction to the environment than oil. Oil has recently been very much in the news in Maine in several contexts.

Oil in Gulf of Maine

Despite the State's grant of prospecting rights to one company, there is no known oil deposit under waters reasonably close to Maine.

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172. 38 M.R.S.A. 417 as amended by P.L. 1969, c.431, §5.

173. 38 M.R.S.A. 364 as amended by P.L. 1969, c.431, §3.

174. See Conference Report: Water Quality Improvement Act of 1970, 91st Congress, 2d Session.

The Oil and Gas Conservation Development Act, however, was passed in anticipation of producing offshore wells.[175]

Machiasport

There is a variety of proposals for a free trade zone at Machiasport for the refining of foreign crude oil, and for a refinery complex not tied into a free trade zone; raw materials could be foreign crude, crude from the new finds on the Alaskan Oil banks, or crude oil from the Gulf of Maine. (Different legal problems covering each of these contingencies are discussed in Volume II, p.376). The oil refinery complex is being promoted as an opportunity to relieve the economic depression in Washington County, give lower fuel prices for New England, and produce more tax revenue from development of the oil refinery and related industries.

The euphoria of the economic advantages to the community were somewhat dampened by the President of Atlantic World Port in discussing an investigation made for his company.[176] He predicted that there would be an oil refinery in Maine within three years; that his company might consider building a refinery if no other oil company did; and that pollution could be controlled but oil spills would be unavoidable. As far as increasing local employment, he predicted that it would require about 2,000 persons to build a refinery, but almost all of these would be trained construction workers from outside the state. Once built, modern

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175. 10 M.R.S.A. 2151-2166 as added by P.L. 1969, c.301. See Vol. IV on Maine Mining Laws for discussion of provisions of this bill relating to pollution.

176. Report of remarks by Mr. Robert Monks discussing Machias Bay-Environmental Management-Arthur D. Little Co., December 1969, [Draft]. (National Fisherman, March, 1970, p.4A.)

refineries require only about 200 people to operate. These people must be highly trained, so the local labor force would probably not be tapped. He went on to say that it is unlikely that other industry would move into the area; most light industry avoids being located near a refinery. He said that no other area on the coast would want an oil refinery. He also questioned the savings to the consumer. Fuel oil is brought into New England at the same price as other marketing locations, but in New England there is a higher markup.[177]

The feasbility of Machiasport is dependent on availability of crude, which in turn is dependent on transportation from the Alaskan oil fields, discovery in the Gulf of Maine, or increased quotas for foreign oil. Oil from Alaska would depend on transport via ice-breaker tanker; on its test run along the route, the Manhattan's hull was ruptured in a collision with an iceberg. Atlantic Richfield is reported to be studying the feasibility of transporting the oil by special tanker submarine.[178]

Oil Import Quotas

The whole question of import quotas and the high cost of fuel oil in New England is being surveyed by the New England Regional Commission and Congress. Import quotas and the development of oil refinery facilities in New England are closely interrelated.

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177. National Fisherman, March, 1970, p.4A. See also remarks by Congressman Peter Kyros that crude oil delivered in Portland actually sells at a lower price in Montreal than in Maine (Report to Maine, February, 1970).

178. Id. See also Portland Evening Express, December 17, 1969, p.21.

Long Island

King Resources has recently purchased the former Navy oil storage depots on Long Island and successfully petitioned the Portland City Council[179] to rezone the area to authorize its use for oil storage facilities. (Now that it is zoned industrial, an oil refinery would be a conforming use.) The decision to rezone was a difficult one. The City of Portland badly needs to expand its economic base. Long Island at the moment is not an economic contributor to Portland and there is every indication that the area will deteriorate further if its economic prospects are not revitalized. But oil coming to Maine is being judged against the backdrop of the Torrey Canyon and Santa Barbara. Gardiner Means, Chairman of the Conservation and Planning Committee for Machiasport, has stated that it would take the spillage from the well in Santa Barbara 13 years to fill up one of the new supertankers.[180] Despite tremendous advances in technology, there is no guaranteed successful way to handle massive oil spills on a rough sea and a strong tide.

OIL ALREADY IN MAINE

The most obvious answer to all of the above is that regardless of what happens at Machiasport, Long Island, or the oil quotas, oil is already in Maine. Portland is already the second largest oil handling

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179. Council Meeting, June 16, 1969.

180. Remarks made at Coastal Conference at Southern Maine Vocational Technical Institute, July 19, 1969.

port on the East Coast. There are 13 oil terminals receiving petroleum products in Portland harbor. There are 46 companies operating coastal vessels or barges carrying petroleum products in Maine waters; 55 ports in Maine handle oil products although Portland and Searsport are the only major oil ports.[181] During 1969, 438 tankers brought 142 million barrels of crude oil which were unloaded at the South Portland Pipe Line.[182] Oil has been sent through this pipe line to the refineries in Montreal since 1941,[183] when it was opened as a wartime measure. Other oil terminals in Portland harbor handle about 22 million barrels. Of this amount, only 175 barrels have been spilled, only about one-ten-thousandth of 1%.[184] It has been estimated that all cargo moving through Maine ports contribute over $30 million annually to the economy of Maine.[185]

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181. Oil and Hazardous Materials Contingency Plan for Prevention, Containment and Cleanup for the State of Maine: [Prepared as a Public Service by the Portland Harbor Pollution Abatement Committee, January, 1970.]

182. Portland Press Herald, January 31, 1969, p.52.

183. 90 billion gallons - 68 billion crude and 22 billion refined products - have gone through this pipeline since 1941. (Conversation with Mr. Edward Langlois, Manager, Maine Port Authority, March 12, 1970).

184. Portland Press Herald, January 31, 1969, p.53.

185. This figure includes flour, wood pulp, liquid coal tar, hides and general cargo. See p.495 for oil's contribution to this figure.

Against the economic benefits must be balanced the cost of cleanup vividly illustrated by the $46,303.46[186] spent to clean up an August 9, 1969 spill from the Esso Guilford. The monetary value of the oil spilled was approximately $10.00.[187] The several thousand gallons of chemicals used to disperse and alleviate the spill were more detrimental to marine life than the oil. Situations like this have led the Department of the Interior to banning the use of certain chemicals for oil spills.[188]

State Oil Handling Controls

Prior to 1970 regulation of oil pollution and spillage in Maine was limited to a State statute against nuisance, the inadequate authority of the Environmental Improvement Commission, and authority exercised rightly or wrongly by municipalities.

The intentional placing or depositing of oil and petroleum based products directly or indirectly into inland or tidal waters of the State is defined as a public nuisance.[189] The EIC classifications for tidal waters require:

> There shall be no floating solids, settleable solids, oil or sludge deposits attributable to sewage, industrial waste or other wastes, and no deposit of garbage, cinders, ashes, oils, sludge or other refuse.[190]

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186. Bill on file in Coast Guard Base in South Portland.

187. Interview with Captain Robert A. Lee, U.S.C.G.

188. Portland Press Herald, August 18, 1969, p.13.

189. 17 M.R.S.A. 2794.

190. 38 M.R.S.A. 364 as amended by P.L. 1969, c.431.

A pollution control provision under the EIC statutes further specifies:

> There shall be no discharge of grease, oil, gasoline, kerosene or related products into the inland waters [or into the marginal sea] of this State. Any person, corporation or other party that discharges, or permits to be discharged, grease, oil, gasoline, kerosene or related products into the inland waters [or marginal sea] of this State shall remove same from said waters...[191]

Statutes administered by the Department of Sea and Shore Fisheries indirectly relate to oil spillage by providing a penalty for discharging any substance on flats under cultivation which may directly or indirectly injure the shellfish thereon;[192] and provide for closing of contaminated flats.[193]

New Legislation - Coastal Conveyance of Petroleum

The January-February, 1970 Special Session of the Legislature passed the Coastal Conveyance of Petroleum Act.[194] The Environmental Improvement Commission was designated to make regulations for the transfer of oil and petroleum products between vessels and on shore facilities and between vessels within the jurisdiction of the State.[195] It was further charged with securing the prompt containment and removal of any

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191. 38 M.R.S.A. 416 as amended by P.L. 1969, c.431. Phrases in brackets struck out by P.L. 1969, c.572.

192. 12 M.R.S.A. 4351.

193. 12 M.R.S.A. 3503.

194. 38 M.R.S.A. 541-557 as added by P.L. 1969, c.572. Complete text p.624

195. See also Draft Provisions for Regulation of Oil Terminals and Refineries, drawn up by the Conservation Subcommittee of the Machiasport Conservation and Planning Committee, received by Governor Kenneth M. Curtis and referred to the Environmental Task Force and the EIC on November 3, 1969. Presumably some of the suggestions contained therein will be incorporated into EIC regulations.

pollution occasioned thereby, and providing procedures to make restitution to persons damaged by such oil pollution. To finance the operation of the Commission in carrying out these functions, the Maine Coastal Protection Fund was established which is to be financed by license fees and penalties. The license fee for the transportation of oil is to be based on a levy of 1/2 cent per barrel of petroleum products or their by-products transferred by the applicant during the licensing period.[196] The constitutionality of the levy will be discussed in the Chapter on Taxes, infra.

The Act declares that "The powers and duties of the Commission under this sub-chapter shall extend to the areas described in Section 543 above and to a distance 12 miles from the coast line of the State."[197] There is some doubt as to the power of Maine's Environmental Improvement Commission beyond the United States' territorial sea.

The Act imposes absolute liability on those who spill oil.[198] Persons damaged by such pollution will be paid from the Coastal Protection Fund. The pollutor will be liable to reimburse the Fund. Pollutors under the license procedure repay only amounts over $15,000 minus any payments received under any Federal program. The first $15,000 is paid

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196. 39 M.R.S.A. 551 (4)(A) as added by P.L. 1969, c.572.

197. 38 M.R.S.A. 544 as added by P.L. 1969, c.572. See fn. 201 for text of §543.

198. 38 M.R.S.A. 552 as added by P.L. 1969, c.572.

by the Coastal Fund, providing that the spill or discharge is promptly reported.[199] There are no upper limits of liability set under this act.[200]

The reimbursement to third parties from the Coastal Protection Fund is predicated on damages suffered to real estate or personal property or loss of income as a result of a discharge of oil, petroleum products prohibited by Section 543.[201] This section would seem to give the possibility of relief to fishermen whose livelihood is disrupted by oil pollution, either by killing fish or shellfish or by destroying the commercial value of such fish because of a residual flavor of oil. As discussed in Chapter 3, p.239, 261, fishing is a public right; the individual fisherman has been held to have no cause of action for injury to this common right.

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199. 38 M.R.S.A. 551 (6)(B) as added by P.L. 1969, c.572.

200. For an excellent discussion of this problem see Mendelsohn, A. I., Maritime Liability for Oil Pollution--Domestic and International Law. (38 Geo. Wash. L. Rev. 1 (1969)). National Fisherman, March, 1970, p.30A, summarized the present status of the law by reporting that the United States Senate has signed, subject to Senate ratifications, an international convention recommending that shipowners carry the financial responsibility for oil spills at the rate of $125 per gross registered ton. Maximum liability per spill will be $14 million. This schedule adopted by the Intergovernmental Maritime Consultative Organization in Brussels in late November still must be ratified by eight Governments of the 36 nation United Nations Agency. Oil companies with more than half the total tanker tonnage of the world fleet started an insurance plan early in October known as the Tanker Owners Voluntary Agreement concerting Liability for Oil Pollution [TOVALOP]. It calls for tanker owners to compensate governments for controlling and eliminating oil spills at a rate of $100 per registered gross ton to a spill maximum of $10 million. The agreement was developed and signed by the worlds seven largest companies - British Petroleum Co., Gulf Oil Corp., Mobil Oil Corp., Royal Dutch Shell Group, Standard Oil Co. of California, Standard Oil of New Jersey and Texaco. Others have joined since.

Assuming that "loss of income" covers the fishing resource:

What is the measure of damages if a living resource is actually obliterated?

Will loss of income for more than one year be reimburseable?

What about the processor of fish whose income is dependent on this resource?

FEDERAL REGULATION OF OIL POLLUTION*

There is nothing more deserving of the label "refuse" than oil spilled into a river.202

Even before the recent anxiety about oil in Maine, the United States Coast Guard had been carrying on a vigorous enforcement policy on

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201. 38 M.R.S.A. 543 (as added by P.L. 1969, c.572.) Pollution and corruption of waters and lands of the State prohibited.

The discharge of oil, petroleum products or their by-products into or upon any coastal waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the State, or into any river, stream, sewer, surface water drain or other waters that drain into the coastal waters of the State is prohibited.

38 M.R.S.A. 551 (2) (as added by P.L. 1969, c.572.) Third party damages.

Any person claiming to have suffered damages to real estate or personal property or loss of income directly or indirectly as a result of a discharge of oil, petroleum products or their by-products prohibited by section 543 may apply within six months after the occurrence of such discharge to the commission stating the amount of damage he claims to have suffered as a result of such discharge. The commission shall prescribe appropriate forms and details for such applications. The commission may, upon petition, and for good cause shown, waive the six months limitation for filing damage claims.

202. United States v. Standard Oil, 384 U.S. 224, 230 (1966).

* Ed. Note: See Water Quality Improvement Act of 1970, signed by President Nixon, April 3, 1970.

oil spills in Maine waters, particularly in Casco Bay.[203] Oil tanker movements and the pipeline operations have been carefully scrutinized, both to prevent oil spills and to quickly clean up careless or unavoidable discharges. Pumping of bilges, ballasts, or other cleaning water containing oil, apparently the most common cause of oil spills to date, has been closely monitored. The effectiveness of Coast Guard enforcement has been hampered by the absence of adequate Federal legislation to accomplish the task. Pollution from oil had been covered by the Oil Pollution Act of 1924 which prohibited the discharge of oil from vessels into any coastal waters.[204] The Act was deficient in that discharge was not defined; the prohibited act was limited to coastal waters; there was no liability in

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203. According to the General Manager of the Maine Port Authority, there is no nationwide, much less worldwide uniformity on regulations pertaining to oil movements in harbors or the degree with which existing regulations versus oil pollution are enforced. (Conversation with Mr. Edward Langlois, February 18, 1970). The Port of Portland is known as a tough port, and ship owners, sometimes painfully, have been made aware of the careful monitoring of oil discharges and spillages in the Casco Bay area. In addition to the vigorous enforcement of federal regulations by the Coast Guard, another contributing factor to this "get tough climate" is the Portland Harbor Pollution Abatement Committee (PHPAC), an unofficial organization which is concerned with control of oil spills, emergency planning, education, and research and testing of pollution abatement equipment.

This committee is financed by contributions from oil terminal operators in the area. It is composed of representatives of the petroleum industry, the U.S. Coast Guard, the Portland and South Portland Fire Departments, City Councillors from these cities, ship's agents, the Greater Portland Chamber of Commerce, the Maine Port Authority (the general manager of this authority serves as chairman of the PHPAC), and civic and business leaders. In 1968 the Committee received a $64,350 grant from the Federal Water Pollution Control Administration to conduct tests on 1) mechanical and pneumatic oil barriers, 2) oil recovery units, 3) disposal of oil recovered from spills. (See Maine Ports, State of Maine 1969-70, p.50). The activities of this committee were reported at a December 15-17 conference in New York City sponsored by the FWPCA (Cont'd)

the case of an emergency or an unavoidable accident; and the legislation contained no provisions to penalize seepage from oil tanks.

Congress made things worse by the Clean Water Restoration Act of 1966;[205] now grossly negligent or willful spillage is required, making the Act virtually unenforceable. New water legislation is pending in Congress.[206]

In the meantime, the strongest weapon in the Federal arsenal against pollution is an 1899 Act which makes it unlawful

> to throw, discharge, or deposit, or cause, suffer or procure to be thrown...any refuse matter of any kind or description whatever other than that flowing from streets or sewers and passing therefrom in a liquid state into any navigable waters of the United States,...[207]

and provides for a fine not exceeding $2,500 nor less than $500.[208] The Act, however, does not require the pollutor to clean up the oil and the fine is cheap in comparison to clean up costs.[209]

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203. (Cont'd) and the American Petroleum Industry. (Portland Press Herald January 31, 1970). The committee has compiled information bulletins describing its work. Inquiries about its operations and its findings continue to pour in from all over the world -- the latest being officials from St. Petersburg in the wake of their latest oil spillage disaster. (Conversation with Mr. Edward Langlois, February 18, 1970).

204. 43 Stat. 604, 33 U.S.C.A. 431 et seq. See - What constitutes a violation of the prohibition, in the Oil Pollution Act of 1924 (2 ALR Fed. 794).

205. 80 Stat. 1246.

206. S. 7, H.R. 4148.

207. 30 Stat. 1152, 33 U.S.C.A. 407.

208. 33 U.S.C.A. 411.

209. See p.483.

Oil has been held to be "refuse" under the 1899 Act[210] and a relatively recent 5-4 decision by the Supreme Court of the United States ruled that gasoline comes under the prohibition versus "refuse."[211] The dissenting judges felt that this penal statute should be more strictly construed and that "If the federal government finds that there is sufficient obstruction or pollution of navigable waters caused by the introduction of commercial oil or other nonrefuse material, it is an easy matter to enact appropriate legislation."[212]

The 1899 Act has been used extensively in Portland Harbor to libel ships that spill oil. In 1968 an action was brought under the Refuse Act against a tannery for polluting the Saco River by oil which had inadvertently been discharged through an outlet pipe. The charge was dropped because: (1) In case of shore installations that pollute navigable waters, a crime must be charged;[213] in the Saco case there was an inability to prove intent. (2) The oil passed through a sewer. If intent could be proved, however, it is possible the tannery might be criminally liable if oil were found to be insoluble industrial waste within the terms of the Act on the basis of the United Supreme Court opinion that

> All matter in suspension is not saved by the exception clause in §13 [33 U.S.C.A. 407]. Refuse flowing from "sewers" in a "liquid state" means to us "sewage."[214]

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210. United States v. Ballard Oil Co., 195 F. 2d 369 (2nd Cir. 1952).

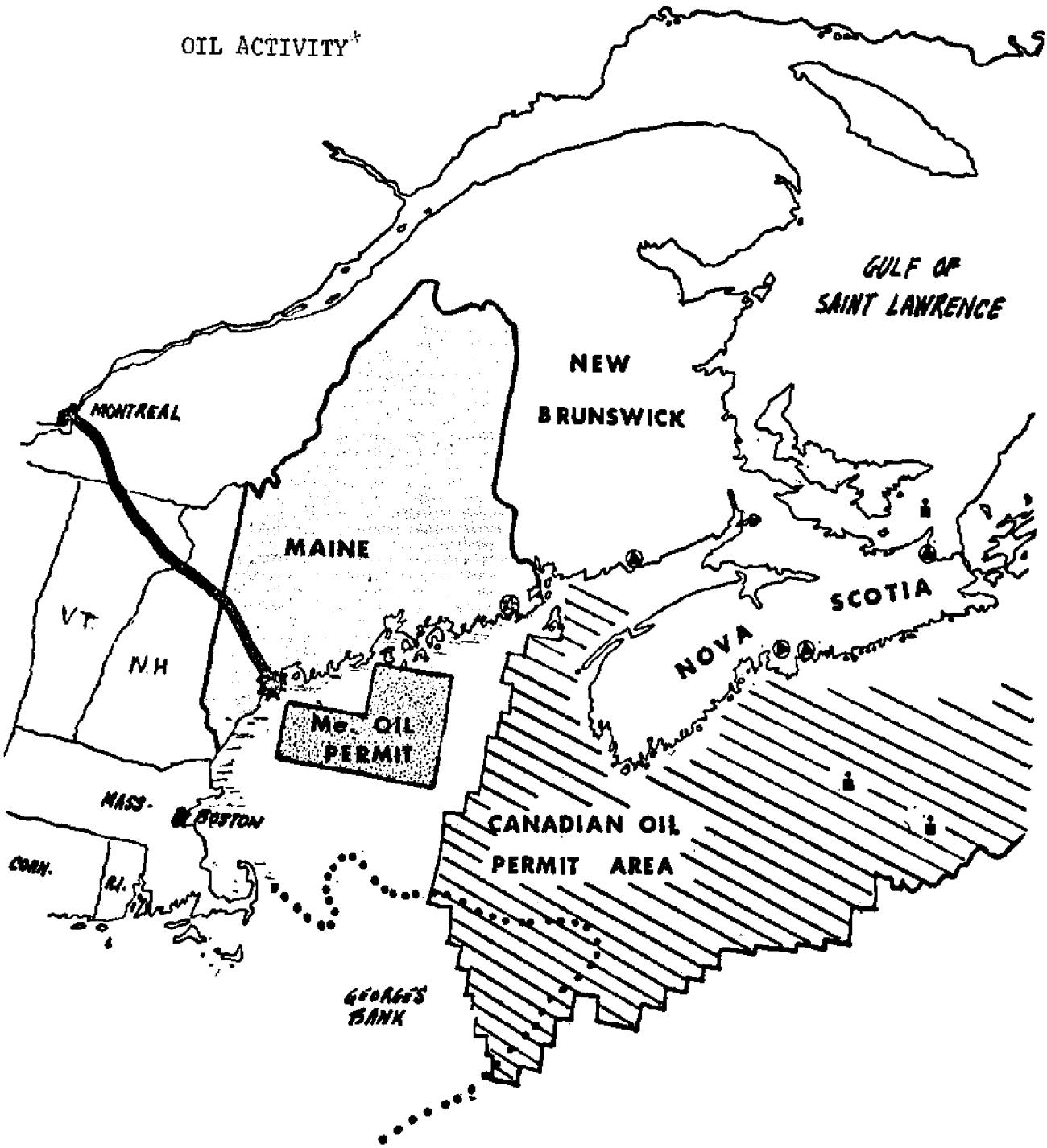
211. United States v. Standard Oil, 384 U.S. 224 (1966).

212. Id. at p.237.

213. 33 U.S.C.A. 407, 411 establish criminal liability; 33 U.S.C.A. 413 established civil liability against vessels and vessel owners. See Portland Press Herald, December 27, 1968.

214. United States v. Republic Steel, 362 U.S. 482, rehearing denied 363 U.S. 858 (1960) on remand 286 F. 2d 875.

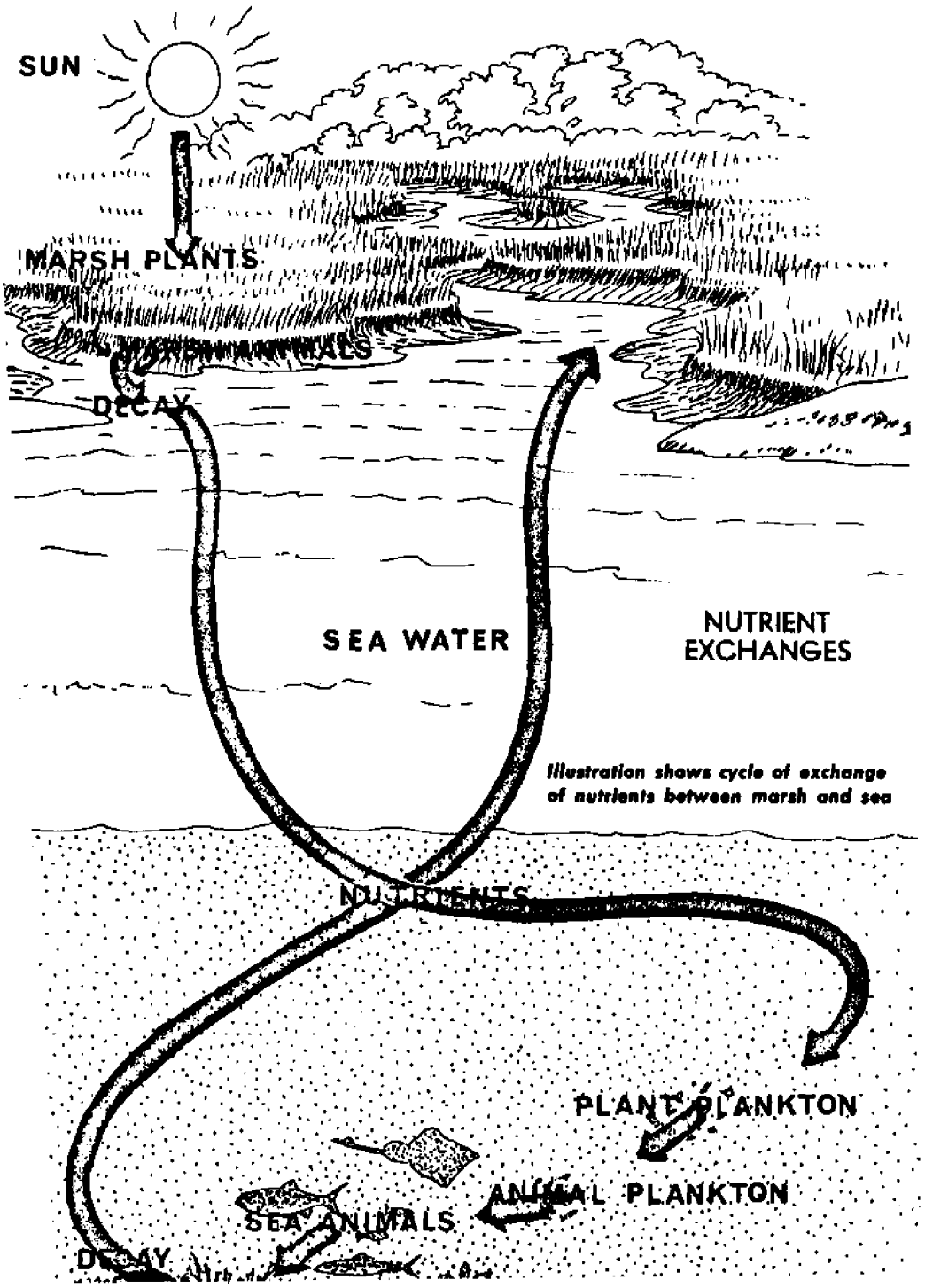
OIL ACTIVITY*



OIL ACTIVITY INCREASING — The State of Maine has issued this map to show that the search for oil already is under way to the north and east under permits given by Canada. Maine has given a permit to King Resources for oil exploration in 3.3 million acres off the coast in the shaded area. Official protests have been registered against Canadian permits embracing the Georges Bank area off Cape Cod. The heavy line is the Portland-Montreal pipeline. Portland handles the second largest volume of oil of East Coast ports, 167 million barrels last year. Down east on the Maine coast a dot indicates the proposed Machiasport refinery. Less than 55 miles from Eastport Canada has an oil refinery in New Brunswick. Dots at the right are locations of oil drill test holes in Canadian waters.

* Reprinted, Portland Press Herald, April 15, 1970.

TIDAL MARSH*



* Taken from Carl N. Shuster, Jr., The Nature of a Tidal Marsh. The New York State Conservationist, August-September 1966. Reprinted as Information Leaflet, New York State Conservation Department, Division of Conservation Education.

IV POLLUTION AND LIVING RESOURCES FROM THE SEA[215]

Reference was made previously to massive fish kills in two Maine streams (See p.422). Other headlines attest to the effect of industrial and sanitary pollution on fish. "Water Pollution Worries Atlantic Salmon Rearers";[216] "Pollution Drives Tasty Herring Away, Mid-coasters Complain";[217] "Taking Shellfish From Great Bay Barred by N.H."[218] "Hard To Believe" reported dumping of cans of sardines rejected for human consumption from the Port Clyde Canning Company pier; the cans became perforated and were washed ashore near the pier and other beaches and added the stench of rotting sardines to the visual pollution.[219]

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215. See Dow, Robert L., Effects of Insecticides on Marine Species (April 4, 1964 retyped April 15, 1967); Hazards of Coastal Mining Operations to Marine Resources, Dow, Robert L., Groggins, Philip L. and Huarst, John W., (September 1963); The Need for Specific Sanitary Requirements for Various Species of Shellfish (paper presented by Dow, at U.S. Public Health Service National Conference on Shellfish Sanitation, September 1954, Washington, D.C.);Sources of Pollution Affecting the Shellfish Industry and Coastal Recreation (Statement by Dow, Robert L., before the Special Subcommittee on Air and Water Pollution of the Senate Committee on Public Works hearings on Federal Water Pollution Controls, Portland, Maine, July 2, 1965.).

216. Portland Press Herald, April 1969, story by David Blakee, Canadian Press Writer reported a salmon culture station 14 miles north of Fredericton, N.B. on the St. John River had been subjected to an unidentified source of pollution which had resulted in massive fish kills.

217. Maine Sunday Telegram, November 2, 1969, p.22A.

218. Portland Press Herald, April 17, 1969. Restrictions were imposed after an oil barge hit a pier and the resultant seepage had rendered shellfish dangerous for human consumption.

219. Maine Times, August 8, 1969.

Approximately 100 separate shellfish areas in Maine, covering over 70,000 acres, are closed because of pollution, with an estimate of over $1.8 million annual income lost from the resources of these flats. This represents a greater monetary value than is harvested from the flats which are open.[220] Some of this production is salvageable by processing clams (and possibly oysters) through depuration plants.[221] This method has been sanctioned, however, only for clams taken from mildly polluted areas.

One area example demonstrates the problem. Pollution, which threatened the closing of Scarborough's extensive clam flats and its bathing beaches, was the subject of an August 6, 1968, meeting of state officials from the EIC, the Department of Sea and Shore Fisheries, town selectmen, and local clam diggers. An official of EIC reported that the bacteria count taken the previous winter from 14 locations varied from below 70 (See Chart No. 2, p.438) to as high as 110,000 in the Nonesuch River and was well over 1,000,000 near industrial plants. From the limited number of samples taken, the general deterioration of all tidal waters in the Scarborough area was indicated.[222] In 1968, Scarborough had the only shellfish growing areas south of Yarmouth which had been open throughout the summer for the past five years; these areas were a border-

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220. Interview with Research Director Maine Department of Sea and Shore Fisheries, Robert L. Dow, November 26, 1968.

221. 12 M.R.S.A. 3452 (Supp.).

222. Portland Press Herald, August 6, 1968, p.11.

line situation.[223] Local clamdiggers complained that much of the town's water pollution came from raw sewage dumped directly into streams. One septic tank company had been "caught in the act" of dumping into the marshes.[224] Scarborough has been moving rapidly ahead in plans for and construction of sewerage facilities. Loss of clam flats and threats of closing of the profitable beaches has spurred this effort. Even in the fashionable Prout's Neck area of Scarborough, persons initially violently opposed to the construction of sewerage facilities now welcome such "intrusions".[225] While elimination of sewage from Scarborough or other beaches would still be subject to the 1976 timetable, any beach could be closed as a health hazard or under the common law doctrine of nuisance.[226] This is in effect what prompted Old Orchard Beach to install sewerage facilities several years ago. The mere threat of closing the beaches with the resultant adverse publicity were material factors in the installation of sewerage treatment plants in Old Orchard.[227]

Pollution From Mining

Concentration of metal ions in shellfish apparently resulting from mining operations in the Cape Rosier area, have been documented. Clams in the immediate area have contained traces of zinc, copper, iron, manganese, cadmium, lead, chromium, nickel, and cobalt -- in most cases

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223. Id.

224. Id.

225. Interview with Robert Steele, Town Manager of Scarborough, November 20, 1968.

226. See 38 M.R.S.A. 372.

227. Interview with Chief Engineer of the EIC, Raeburn McDonald, February 10, 1969.

substantially higher than at other points along the Atlantic coast. As stated in Vol. I, p.67, shellfish have a characteristic of concentrating pollutants, making an otherwise acceptable level of pollution dangerous for human consumption. In addition, certain metal ions are highly toxic to certain shellfish, e.g., copper in lobsters. The Cape Rosier is the area at which a tidal estuary was dammed and drained to facilitate mining activity.[228] At the time of the passage of the legislation authorizing the closing of this estuary, a representative of the Department of Sea and Shore Fisheries had testified that damage to fishery resources in Second Pond would be negligible, but did not speak to the effects of the potential pollution in the estuaries and coastal areas.

This particular mining enterprise employs about approximately 100 persons, and according to its spokesmen contributes over a million dollars to the economy of Maine.[229] On the other hand Hancock County is one of the principal lobster producing areas of the world as well as being a source of other valuable shellfish. The landed value of lobsters has averaged around $2.5 million. The primarily wholesale value of this resource in terms of offshore operations is estimated to be $4.5 million annually. The value of clams and scallops from this area augments the total amount.[230]

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228. See Opinion of the Justices, Me. 216 A. 2d 656 (1966); Discussion Vol. II, p.373 on Eminent Domain; Mining Laws, Vol. IV.

229. Maine Times, October 11, 1968, p.3; Maine Sunday Telegram, January 25, 1970, p.11B.

230. Hazards of Coastal Mining Operations to Marine Resources, Dow, Groggins, Hurst, September 1963.

One of the problems of monitoring metallurgical pollution from mining operations is lack of funds in the Department of Sea and Shore Fisheries; recently the Environmental Control Agency of the New England Marine Health Science Laboratory either withdrew or cut back on funds to make these tests.[231]

Oil

The potential hazards of oil to marine life have been set forth in other portions of this chapter. In attempting to balance the economic value of development of oil versus conservation of living resources from the sea, figures from the last industrial and financial edition of the Portland Press Herald are worthy of examination. In that report the Commissioner of Sea and Shore Fisheries estimated the landed value of fishery resources at $26 million. In the same edition, the Maine Port Authority reported that cargo moving through Maine ports, including oil, contribute over $30 million annually to the economy of Maine.[232] Of this amount $27 million is attributable to oil ($26 million from the Port of Portland and $1 million from the port of Searsport, which is the terminus

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231. Interview with Robert L. Dow, March 13, 1969. It should be noted that the presence of metal ions in shellfish may be attributed to natural metal outcroppings, and in some parts of the world investigations of concentration of metal ions in shellfish has been used to locate mineral deposits rather than as a method to insure health by preventing pollution from this source. Even in Maine this technique has revealed deposits which had not previously been known to exist. Perhaps funds to maintain safe health levels will have to come from the Bureau of Mines rather than from environmental control agencies.

232. Industrial and Financial Edition, Portland Press Herald, January 31, 1970. Other cargoes handled by Maine ports are flour, fish meal, casein, china clay, titanium dioxide, tapioca flour, wood pulp, liquid cold tar, hides and general cargoes.

for the tank of the pipeline to Dow Air Force Base and Loring Air Force Base). The figure is predicated on a contribution of one dollar ($1.00) per ton of oil to the economy; this includes the employment of tugboats, crewmen, expenditures on shore, for haircuts, etc. In most United States ports the value to the economy is given as $3.25 for oil. The total estimate does not include oil or gasoline shipments to any of the other 53 ports in Maine which have oil handling facilities. These are mostly small shipments of gasoline, fuel oil, etc.[233]

It is apparent that the total economic contribution of oil shipments closely approximates the landed value of fish in Maine ports. But the total economic contribution of the fisheries resource would be 3 to 4 times this amount. Fisheries are, therefore, still far more economically valuable to Maine than oil shipping or, indeed, all shipping combined.

Pollution From Land Development

One of the greatest threats to living resources from the sea is "clean pollution" in the guise of fill, including the filling in and the obliteration of tidal marshes and tidal estuaries for real estate development, excavations and fill for marinas, motels, wharves, piers, and private land fills as well as dumping of spoil from highway and navigation projects.

Salt water estuaries serve two important functions: 1) many species of economic value depend on this type of environment during all or part of their life cycle, i.e. the shrimp and menhaden; 2) other marine

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233. Conversation with Edward Langlois, General Manager, Maine Port Authority, February 18, 1970.

species are dependent on the ecological system of the estuaries which provide a source of nutrients. The estuary is the primary link of the aquatic food chain that extends to a series of consumers, herbivorus and carnivores, and ultimately to a form of food that may be utilized by man such as the large fish and shellfish.[234]

It is the preservation of this bio-eco-system that makes the Wetlands legislation[235] so vital to commercial and sport fisheries and accounts for the great concern of the Department of Sea and Shore Fisheries in the operations of the Wetlands Control Board. The same concern is reflected in the agreement between the Department of Interior and the Corps of Engineers as to the approval of specific harbor and navigation projects and the disposition of the spoil.[236]

> Over 90 per cent of the total harvest of seafoods from waters off the United States are taken on the Continental Shelf. Nearly two-thirds of that fraction are composed of species whose existence depends on the estuarine zone; or which must pass through the zone en route to spawning grounds....

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234. McHugh, J.L., Are Estuaries Necessary?, Commercial Fisheries Review, November, 1968, p.37; Odum, Eugene P., The Role of Tide Marshes in Estuarine Production, New York State Department, Conservationists, June-July, 1961; Matthiessen, George C., Tide Marshes, A Vanishing Resource, Pamphlet by Maine Audubon Society, 22 Elm St., Portland, Maine.

235. See Vol. I, p.57 and Vol. II, p.296 discussing this legislation.

236. See Memorandum of Understanding between the Secretary of the Interior and Secretary of the Army, dated July 13, 1967 to be found in U. S. Code Congressional and Administrative News, 1968, Vol. II, p.3107-8. The history of the Estuary Inventory Studies, P.L. 90-454, 82 Stat. 625 is to be found in Vol. II, U.S. Code of Administrative News, p.3094-3115.

> In 1960, estuarine-dependent seafood resources supported about 90,000 commercial fishermen to whom they yielded 2.8 billion pounds. This quantity was worth $59 million on the wholesale market. The resources yielded an additional 900,000 pounds to about 1,600,000 anglers. It is hard to evaluate recreational fishing, but if the amount spent specifically for fishing expeditions over and above normal living costs be accepted as an index, the value of the sportsmen's catch of estuarine-dependent fishes was about $163 million.[237]

The management of estuaries and control of pollution have also been subject of the National Estuarine Pollution Study authorized by the Clean Water Restoration Act of 1966.[238] A hearing was held in Portland, Maine on September 10, 1968 under the aegis of this legislation. At the hearing much testimony was introduced about marine pollution, particular problems in Maine, and pessimistic appraisals of the probable results of the study given the budget and timetable. The same sentiment was reflected in the interview with the Chief Engineer of the Environmental Improvement Commission;[239] that the inventory could be nothing more than just a cataloguing of pollution.[240] There is no broad statewide estuarine research in Maine, although specific projects have been undertaken in specific areas. No one doubts the value of this type of information but the personnel and physical resources have not been provided to carry it out. Other studies of estuaries are being carried out under other programs whose interests are broader than pollution.[241]

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237. U.S. Code Congressional and Administrative News, 1968, Vol. II, p.3098.

238. P.L. 89-753, 80 Stat. 1246, 33 U.S.C.A. c.466 et seq.

239. Interview with Raeburn McDonald, February 10, 1969.

240. Id.

241. Estuarine Inventory Study, P.L. 90-454, 82 Stat. 625, (see fn.236); See Inventory by Sea and Shore Fisheries, Vol. I, p.104; Estuarine Inventory by Sea and Shore Fisheries reported in 25th Biennial Report, p.41.

CHAPTER SIX RECREATION - MAINE LAW AND COASTAL LAND USAGE*

SCOPE OF THE CHAPTER

This chapter considers Maine law regulating use of Maine coastal land and the adjacent environment. It includes discussion of the need for such regulation, of the appropriateness of the law, of present land use compared to the need -- all with particular attention to recreational usage.[1]

The emphasis of the chapter is on municipal, regional and State planning, and related legal tools used to maintain and increase access to, and maintain and improve the quality of coastal usage.

I MAINE'S ROLE IN PERSPECTIVE

TRUSTEE FOR THE NATION

The Chief of the Northeast Regional Planning Office of the Bureau of Outdoor Recreation stated in 1966 the primary importance of Maine's regulation of its coast within our federal union:

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* Ronald C. Allen, University of Maine School of Law, 1970.

1. Coastal recreation runs the gamut from totally active types of usages such as swimming and surfing to almost totally inactive types such as simply absorbing scenic environment, a form of receptive recreation. "There are many places along the Maine coast where large numbers of people should be encouraged to go for enjoyment of active, organized, exertive recreation. There are some few places with special scenic qualities that should be protected from invasion by the crowd and reserved for what the senior Olmsted called receptive recreation." C. Elliot, As Maine Goes...Which Way? in The Maine Coast Prospects and Perspectives, p.3 (Center for Resources Studies, Bowdoin College, 1966). [Hereinafter cited as Bowdoin Study of Prospects and Perspectives.]

> You, the citizens of Maine have been given the stewardship of a unique natural resource. I use the word "stewardship" because it indicates both use and the responsibility to others...and I suggest that the others are the citizens of the United States, both present and future.[2]

Maine's coast is "a unique natural resource" whose stewardship in the first instance is vested in local government. But inability, inactivity or abuse at the local level will give rise to increased state and federal involvement.[3] The federal involvement, if it comes will be less the product of theories of "stewardship", however, than the result of the reality of the federal purse.

Virtually every state and local government is short of funds for even the most necessary of projects.[4] Federal grants to state and local governments have thus gained increasing importance; and these grants, which are for a wide variety of purposes, are subject to a variety of conditions. This has given rise to certain political and economic facts concerning control. The federal government is in a position, within broad limitations, to decide who will receive, how much and under what conditions.

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2. R. Galantowicz, The Potential Demand for Recreation Along the Maine Coast, in the Bowdoin Study of Prospects and Perspectives, p.21.

3. See O. Delogu, Beyond Enabling Legislation, 20 Maine L. Rev. 1 (1968) for a call for continuous and comprehensive planning and land use control at all levels of state government.

4. See e.g., J. VanGelder, States Desperate in Hunt for Funds to Meet Demands in The New York Times, Sunday, July 13, 1969, pp.1 & 38 and Editorials, Income Tax and In-Fighting Over the Inevitable, in the Maine Sunday Telegram, May 25, 1969, p.6D.

This dollar logic coupled with aroused national interest in natural resources, makes the statement as to "stewardship" a practical reality as to many aspects of Maine coastal usages.

The interested reader need examine only two federal programs, "Open-Space Land, Urban Beautification, and Historic Preservation" (Open Spaces)[5] and "Land and Wilderness Conservation Fund Act of 1965" (Outdoor Recreation)[6], to find clear examples of the great potential for federal involvement affecting Maine coastal usage.[7]

Such an examination will reveal certain common elements in the federal legislation:

1. There is a fairly recent, resurgent and increasing national interest in land usage and environment preservation, reflecting a fear that recreational facilities and other natural resources may be inadequate in quantity and quality for our national needs.

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5. 42 U.S.C.A. §1500 to §1500e.

6. 16 U.S.C.A. §460L-4 to §460L-11

7. There are a number of Federal programs and proposals which might affect coastal usage within Maine; "Open Spaces" and "Outdoor Recreation" are representative ones of current interest. For other programs see Panel Report Vol. 1, p.III 81-105. (See fn.11, this chapter for full citation.)

2. In an attempt to forestall or alleviate a natural resource and recreational facilities crisis, the Congress is making federal moneys and services available for governmental planning, acquisition and development.[8] (As to Maine's share of some of these moneys in fiscal year 1968 see Appendix A.)

3. State and local governments apparently cannot or will not deal with these problems without the assistance of Federal funds and services.

4. Federal funds are available for the most part on a contract basis with the Federal government potentially in complete control over recipients, amounts, and conditions.[9] This yields federal control over the project, its quality and quantity, and in most instances, its continued usage.[10]

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8. "Since the Land and Water Conservation Fund program went into effect in January 1965, total funds allocated have amounted to $352,312,239, of which $131,152,431 have been for Federal programs, $214,314,808 for State programs...During Fiscal Year 1968, Congress appropriated $51,416,000 for Federal Acquisitions, $65 million for State acquisitions and development grants,...Since the inception of the program, 133 State projects totaling $28,150,000 have been undertaken,..." in Panel Report Vol. 3, p.VII-243 (See fn.11, this chapter.) These programs will probably not provide moneys equal to the amount authorized. The "Outdoor Recreation" fund will probably operate at about $90 million in Fiscal Year 1969 due to budget cutbacks. Report of the Panel on Marine Resources, Role of Federal, State and Local Governments and Private Sector, in [Id. p.VII-249]. See also "Administration Spawns No New Parks Policy as Budget Knife Hits Land and Water Conservation Fund," The Conservation Foundation Letter, October 1969, 1250 Conn. Ave., N.W., Washington, D.C. 20036.

9. For one recent view of Federal funding see, State of Maine Legislative Research Committee, Report on Tax Sharing v. Grants-In-Aid, in Reports to the 104th Legislature - Vol. 1. (January 1969, Legislative Research Committee, Pub. 104-20.)

10. Given the requirement of State or local "matching", $1.00 of Federal funds buys up to $2.00 of Federal project control.

5. The federal legislation demands comprehensive planning and planning tools (zoning, subdivision control, eminent domain, easements, purchase and leaseback, the taxing power and "other available means") as primary requisites for the receipt of funds.

Another aspect of Maine's role in regulating coastal usage in the national interest is a proposal of the President's Commission on Marine Science, Engineering and Resources:

> Outdoor recreation is becoming a massive rush to the water ...[M]any states still lag in acquiring access to shoreline. Identifying recreation potentials and requirements necessitates qualitative judgments which usually are exercised best at the state or local level. However, recreation planning must accommodate more than simply local interests; unique areas must be preserved as a national resource. [Emphasis supplied][11]

> The Commission recommends that a Coastal Management Act be enacted which will provide policy objectives for the coastal zone and authorize Federal grants-in-aid to facilitate the establishment of state Coastal Zone Authorities empowered to manage the coastal waters and adjacent land. [Emphasis in the original][12]

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11. Our Nation and the Sea, January 9, 1969, (U.S. Government Printing Office, Washington, D.C.), the result of a two year study of the nation's marine resources, authorized by P.L. 89-454 to develop an overall plan for a national oceanographic program. Panel studies made for the Commission, and which provided background for much contained in the Commission's Report, may be found in three volumes:
    Vol. 1 -- Science and Environment
    Vol. 2 -- Industry and Technology -- Keys to Oceanic Development
    Vol. 3 -- Marine Resources and Legal-Political Arrangement for Their Development
    (All available at the U.S. Government Printing Office, Washington, D.C. and hereinafter cited as Panel Report -- Vol. 1, 2 or 3.

12. Id. at 3-19.

The Commission then proceeded to analyze the functions and powers of the proposed State Coastal Zone[13] and recommended:

> ...that Federal legislation to aid the states in establishing Coastal Zone Authorities not impose any particular form of organization but should require that approval of each grant be contingent on a showing that the proposed organization has the necessary powers to accomplish its purposes, has broad representation, and provides adequate opportunities for hearing all viewpoints before adopting or modifying its coastal development plans.[14]

The Commission approved of existing Federal funding possibilities for coastal acquisition, but argued:

> ...that the Land and Water Conservation Fund [Outdoor Recreation] be more fully utilized for acquisition of wetlands and potential coastal recreation lands. Legislation should be enacted authorizing Federal guarantees of state bonds for wetland acquisition when necessary to implement the coastal management plan. [Emphasis in the original][15]

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13. Id. at 3-20 to 3-26.

14. Id. at 3-22 and 3-23.

15. Id. at 3-26. For background see Panel Report - Vol. 1, p.III-1 to III-187. This panel's report is a study of all major marine usages as well as the proposal for Coastal Zoning Legislation in an attempt to alleviate or solve many of the problems that it found. The commission's proposal and recommendations do not go nearly as far as those of its Panel. The Panel administration recommends Federal grants by a single central agency at all stages, i.e., planning, establishing operations, enforcement, research and training, and acquisition and development. Panel Report - Vol. 1, p.III-150, 154 and 155. The Commission recommends matching grants for establishing operations and then grants where necessary within existing Federal agency programs. Our Nation and the Sea, 3-19 and 3-20.
The Panel recommends (having advocated across the board central funding) "two mechanisms to induce positive and progressive State and local action: withholding Federal grants and acquiring and managing areas determined by the Federal Government to be endangered and critical to the National interests but not protected adequately. [Emphasis supplied] Panel Report - Vol. 1, p.III-148; and again at III-155 "[i]t is imperative that the National interests be protected and if for any reason a Coastal Zone Authority cannot (Cont'd)

POLICEMAN AT THE NORTHEAST JUNCTURE OF MEGALOPOLIS

Another important aspect of Maine's role in the regulation of its coast is that of a policeman attempting to preserve and protect it from being destroyed by an automobile-borne hoard of recreation seekers:

> The Maine coast is easily accessible. It is within a day's drive or two hours flight of what I estimate to be some forty million persons. Even, if there are no improvements in transportation by the year 2,000 there will probably be seventy million people within this same region; with the transportation improvements that will certainly take place, the entire North American continent and all of Europe will be within a couple of hours of the Maine coast...
>
> This is why I am quite convinced that we are going to have to think of the Maine coast in really big terms and in a systematic way. It will take all the ingenuity and effort in planning and development and conservation that this State can possibly muster if in the year 2000 and after that, we are to have a Maine coast that will still be one of the scenic marvels of the world.[16]

This obvious necessity for coastal preservation and protection is complicated by the fact that only about 1.3% -- 34 miles of the total 2,612 miles -- of Maine shoreline with recreational potential is in

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15. (Cont'd) act in the public interest, the Federal Government should participate in the actions of the Coastal Zone Authority." [Emphasis supplied] Somewhat less forcefully, the Commission stated: "the Federal Government must ensure that such vital Federal interests as navigation and military security are not endangered by State actions and that the general national interest in effective coastal planning is protected...," and it, too, called for Federal intercession if a Coastal Zone Authority fails to safeguard national interests and withdrawal of funding if the Authority performs inadequately. Our Nation and the Sea, p.3-28.

16. J. Fisher, Toward a Maine Coastal Park and Recreation System, in Bowdoin Study of Prospects and Perspectives, p.90. See also, Outdoor Recreation in Maine Sec. III, Chs. 15, 16 and 17 (1965-Maine Agricultural Experiment Station-University of Maine, Orono, Maine) [Hereinafter cited as University of Maine Study of Outdoor Recreation.]
An interesting estimate in this vein is that "nearly two and one-half million people visited Acadia National Park last year, almost half a million more people than visited Grand Canyon National (Cont'd)

public ownership, and its development status is rated as "low" on a scale ranging from very high (New Hampshire being the only shoreline state of the 28 listed to receive this distinction) to very low (Texas). On the national level "about 6 1/2% of the total recreation shoreline is in public ownership. To meet demands it is considered essential that about 15% be available for public use."[17]

PROTECTOR OF THE PURSE

Beyond the roles of trustee for a nation or policeman to prevent coastal mayhem resulting from the increasing pressures of megalopolis, Maine has a legitimate interest and an active role to play to insure the solvency of its own government and the economic survival and betterment of its citizenry. A very brief foray into the economics of the Maine coast and particularly that of the recreation industry[18] should

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16. (Cont'd) Park during the same period. Acadia also drew nearly 100,000 more than Yellowstone." National Resources Council, in Maine Environmental Bulletin, June 1969, p.4.

17. Panel Report, Vol. 1, p.III-17-18; which also estimated that population pressures would double demands on beaches and shores from 1960 to 1980. It further estimates that to acquire and develop important estuarine habitat and needed coastal potential recreation areas outside the qualifications of Urban Redevelopment of parkland would involve a price tag of $750 million for "coastal states". Panel Report, Vol. 1, p.III-155.

18. There is doubt whether it is possible to accurately measure the recreation industry objectively. The inability to assign dollar values to recreation uses can raise acute problems when decisions must be made as to alternative uses, whether between one recreational use and another, or between recreational use and non-recreational use. For a suggestion that the dollar value of recreation may be measured with greater accuracy than heretofore thought possible, see J. Stevens, Economics of Recreation, in the Bowdoin Study of Prospects and Perspectives, p.15-18. For economic methods used to arrive at future demand for Outdoor Recreation, see the University of Maine Study of Outdoor Recreation. Sec. III, Chs. 15, 16, and 17.

serve to illustrate to all the need for meaningful regulation in this area.

It has been estimated that tourism brought $348 million to Maine's economy in 1967; a 5% increase over 1966[19] and better than $400 million in 1968; a 15% increase over 1967.[20] It has been said that the recreation business is the second largest source of income to Maine people, after forestry and forest products.[21]

The coastal portion of the State is particularly important to the recreation industry, where this industry is undoubtedly the economic leader at present if not for the future.

The coast contains 60% of all the recreation facilities within the State (60% owned by Maine residents -- 40% owned by non-residents) and 62% of all seasonal residences. The property value of recreational property is higher on the coast than in the State interior, and the ten communities in the State leading in estimated recreational property value are all located on the coast (Mount Desert, Old Orchard Beach, Portland, Bar Harbor, Wells, York, Scarboro, Biddeford, Boothbay Harbor,

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19. R. Elliot, Vacation Travel Promotion in 1967, in the 1967 Maine Department of Economic Development Annual Report, p.14.

20. R. Elliot, Vacation Travel, in the 1968 Maine Department of Economic Development Annual Report, p.16, noting that the long-term average is 5%, but that a new ski industry and other changes in conditions account for the increase.

21. The Importance of Forest Industry for the State of Maine, in the University of Maine Study of Outdoor Recreation, p.16.

and Kennebunkport). Finally, many more out-of-state people are attracted to the coastal areas than are attracted to the interior recreational areas of the State.[22]

Recent large scale oil and gas overtures indicate that the importance of recreation to Maine's coastal economy may soon follow the national pattern. It is estimated that nationally, coastal or marine recreation is at least second in terms of coastal economic importance:

> If marine recreation, in all its forms and ramifications, can be called an industry it presently ranks at least a close second to the offshore oil and gas industry in economic importance. It may, in fact, actually outrank oil and gas, but statistics are inadequate to segregate recreational expenditures in the marine environment from those on land.[23]

It is perhaps saying the obvious, however, to note that the attraction of the coast for recreational uses could be lost if it is preempted or spoiled by incompatible usages.[24]

A SUMMARY OF MAINE'S ROLE IN PERSPECTIVE

To recapitulate: Maine has three roles to play in public regulation of Maine coastal usage:

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22. R. Barlow, Trends and Alternatives in Coastal Land Use, in the Bowdoin Study of Prospects and Perspectives, p.13.

23. Panel Report - Vol. 3, p.VII-236.

24. The oft quoted Down-Easter, who after considering all the possibilities told a tourist seeking directions to a municipality "You can't get there from here" may have to advise in the future "Even if you could get there from here, once there, it wouldn't be worth it."

A. Trustee for the entire nation of a unique natural resource;

B. Policeman at the northeast juncture of megalopolis, as the nation's and perhaps the world's population converges on the Maine coast in increasing numbers; and

C. Protector of an economic resource which is key to the State's second most valuable industry.

II PLANNERS, PLANNING AND SOME PLANNING TOOLS FOR REGULATION OF MAINE COASTAL LAND USAGE

We have already noted that due to the low percentage of the coast in public ownership, there is a problem of access. Further, there is a major problem of quality as well, though arguably not as severe at present as is the case with most of the rest of our nation's coastlines.[25] The vital element of public planning to combat these problems has been alluded to.[26]

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25. Anyone doubting that Maine already has a rather serious problem of statewide proportion as to the quality of its coastline and waters can probably best test his doubt by a week-end trip along the coast. A next best alternative would be to peruse the booklet containing a small portion of the nationally acclaimed pictorial study of the problem done by John McKee for the Bowdoin College Museum of Art. J. McKee and Introduced by Justice William O. Douglas, in As Maine Goes, (Bowdoin College - 1956).

26. To view the problems in light of what local, regional or State governmental units can do narrows the scope of exploration to a manageable degree. At the same time, however, it exposes only a portion of the forces (and in many instances not the strongest portion) which might be brought to bear. Industrial, commercial, conservation and other private interest groups are strong in Maine. And, with better than 98% of the present coastline of Maine in private ownership, private decisions and actions can certainly help to alleviate or solve coastal problems as well as aggravate them or (Cont'd)

Present comprehensive planning activity by Maine governmental units which affects coastal usage is found at three levels - local, regional and State. Comprehensive planning activity on the Maine coast was negligible at any level prior to the mid 1950's.[27] In 1954, Congress enacted Section 701 of Title VII of the Housing Act of 1954. Section 701 was entitled "Urban Planning" and made federal funds, up to 50% of cost, available for metropolitan, regional and State planning aimed at communities of 25,000 or less population.[28]

One year later, the powers and duties of the Maine Development Commission were transferred to a newly created Department of Development of Industry and Commerce whose Commissioner was expressly authorized to accept and use federal urban planning funds.[29] Included within

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26. (Cont'd) cause them to exist. While this chapter, however, will not attempt to explore private efforts and possibilities per se, the private planning potential and the influence of pressure groups must be kept in mind.
    Another relevant consideration beyond the scope of this chapter is planned control of population level. (See Maine Environmental Bulletin, March 1969, for review of Ehrlich, P.R., The Population Bomb).

27. See e.g., Maine Department of Economic Development, Progress in Maine Municipal Planning, 1955-1966 pp.IV & 2 and W. MacDonald, Maine State Planning and Resource Coordination, in the Bowdoin Study of Prospects and Perspectives, p.53.
    The Department of Economic Development credits only the Maine coastal communities of Bar Harbor, Cape Elizabeth and Portland with some form of comprehensive type planning prior to 1956.

28. P.L. 90-448, Title VI, §701. The present "701 Program" has upped its focus to metropolitan and rural areas of 50,000 or less population. It offers 2/3 of costs and services for not only the implementation of the planning process and plan preparation but also, the implementation of planning tools resultant from the plan and upon which the plan may depend for success (i.e., zoning, subdivision control, etc.) as well as certain research moneys with which to study and attempt to improve the planning process itself.
    The legislation encourages coordination between local (Cont'd)

this new department was a Division of Research and Planning which had among its duties the preparation, timely revision and perfection of a master plan for the State and to assist in planning under Federal grants or loans, and cooperate with municipal planning boards and other municipal agencies and officials engaged in regional planning.[30] Also included was a Division of Recreational Promotion which had among its duties to encourage and assist in the development and promotion of the recreational resources of the State.[31]

Effective on the same day as the creation of this new department was an act enabling two or more municipalities having existing planning boards to join in preparing coordinated regional planning with the power to "accept gifts, grants or contributions from any source, private or governmental toward its work."[32]

Clearly the availability of federal funds under the "701 Program" had stimulated this burst of activity, resulting in a new State planning facility, a new regional power and a new municipal power[33] to provide comprehensive planning, within which coastal land usage might play a part.

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28. (Cont'd) regional, State and States' planning efforts and planning along "area", "metropolitan", "regional", "State", and "interstate" lines rather than simply by existing municipal physical boundaries, which often are very unrealistic when attempts are being made to deal successfully with land usage or development.

29. P.L. 1955, c.471, §2.

30. Id. §4, VI, VIII.

31. Id. §6, II, III.

32. P.L. 1955, c.42 §99-A, 99-B and 99-E.

33. P.L. 1957, c.405, §61.

LOCAL EFFORTS - STATISTICAL

On the basis of a recent study,[34] it is possible to classify Maine's coastal communities[35] with relation to seven criteria:

1. Planning Board established
2. Comprehensive Plan adopted
3. Zoning Ordinance adopted
4. Subdivision Regulations adopted
5. Capital Improvements Program budgeted
6. Building Codes adopted
7. Housing Codes adopted.

Population[36]

A breakdown of the 95 communities considered reveals that:

7	had	a	population	of	10,000	or over
5	"	"	"	"	5,000	to 9,999
15	"	"	"	"	2,500	to 4,999
21	"	"	"	"	1,000	to 2,499
47	"	"	"	"	under	1,000

Categorizing by population and proceeding roughly in a northeasterly fashion along the coast, the 95 are:

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34. Maine Department of Economic Development, Progress in Maine Municipal Planning 1955-1966, p.9-15.

35. Most listings of the "coastal" municipalities include all those communities where the tide ebbs and flows, a total of between 125 and 130. For the purposes of this section, however the "ebbs and flows" test has been replaced by a more restrictive one that might appropriately be termed an "open coastal waters" test. That is, we include only communities with at least one side to the open sea, or a bay, a total of 95. As noted elsewhere in this report, activities in upstream tidal waters may have a great impact on the shore. But the planning and zoning activities at the "open water" is of the greatest significance.

36. 1960 Census.

(7) 10,000 or over
Kittery
Biddeford
Saco
South Portland
Portland
Brunswick
Bath

(5) 5,000 to 9,999
Scarboro
Cape Elizabeth
Falmouth
Rockland
Belfast

(15) 2,500 to 4,999
York
Wells
Kennebunk
Old Orchard Beach
Cumberland
Yarmouth
Freeport
Waldoboro
Camden
Bar Harbor
Ellsworth
Machias
Lubec
Eastport
Calais

(21) 1,000 to 2,499
Kennebunkport
Harpswell
Phippsburg
Woolwich
Wiscassett
Boothbay
Boothbay Harbor
Bristol
St. George
Rockport
Searsport
Vinalhaven
Stonington
Deer Isle
Blue Hill
Tremont
South West Harbor
Mt. Desert
Gouldsboro
Milbridge
Jonesport

(47) Under 1,000
West Bath
Georgetown
Arrowsic
Southport
Westport
Bremen
Friendship
Cushing
South Thomaston
Owls Head
Lincolnville
Northport
Stockton Springs
Penobscot
Castine
Brooksville
Islesboro
Sedgwick
Brooklin
Monhegan Plt.
Matinicus Isle Plt.
North Haven
Isle au Haut
Swans Island
Long Island Plt.
Surry
Trenton
Lamoine
Cranberry Isles
Hancock
Sorrento
Sullivan
Winter Harbor
Steuben
Harrington
Addison
Beal Island
Jonesboro
Rogue Bluffs
Machiasport
Cutler
Trescott Twp.
Edmunds Twp.
Dennysville
Pembroke
Perry
Robbinston

Broken down by each of the criteria examined:

1. Planning Board Established[37]

(7) 10,000 or over
All had boards.

(5) 5,000 to 9,999
All had boards.

(15) 2,500 to 4,999
All had boards except Machias.

(21) 1,000 to 2,499
12 had boards. (Kennebunkport, Wiscasset, Boothbay, Boothbay Harbor, Rockport, Searsport, Stonington, Deer Isle, Blue Hill, Tremont, Mt. Desert and Milbridge .)

(47) Under 1,000
4 had boards. (Cushing, Owls Head, Castine and Sedgwick.)

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37. 30 M.R.S.A. §4952. Planning Board

1. Establishment. A municipality may establish a planning board.

A. Appointments to the board shall be made by the municipal officers.
B. The board shall consist of 5 members and 2 associate members.
C. The term of office of a member is 5 years...
D. A municipal officer may not be a member or associate member of the board.

. . . .
. . . .

G. The board shall elect a chairman and secretary from its own membership.

. . . .
. . . .

4. Personnel and services. The board may hire personnel and obtain goods and services necessary to its proper function within the limits of appropriations made for the purpose.

2. Comprehensive Plan adopted

(7) 10,000 or over
All had plans adopted except Saco.

(5) 5,000 to 9,999
2 had plans adopted. (Scarboro and Falmouth.)

(15) 2,500 to 4,999
5 had plans adopted. (Cumberland, Freeport, Camden, Bar Harbor and Calais.)

(21) 1,000 to 2,499
4 had plans adopted. (Kennebunkport, Boothbay, Boothbay Harbor and Searsport.)

(47) Under 1,000
None had a plan adopted.

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38. 30 M.R.S.A. §4952

2. Plans. The board [municipal planning board] shall prepare, adopt and may amend a comprehensive plan containing its recommendations for the development of the municipality.

A. Among other things, the plan may include the proposed general character, location, use, construction, layout, extent, size, open spaces and population density of all real estate, and the proposed method for rehabilitating blighted districts and eliminating slum areas.
B. The board shall hold a public hearing on its tentative proposals, before it adopts the plan or an amendment of it.
C. Once adopted by the board, the plan becomes a public record. It shall be filed in the office of the clerk.
D. After the board has adopted the plan, an ordinance or official map authorized by this subchapter may not be enacted, adopted or amended, and public property may not be established or modified in location or extent, until the board has made a careful investigation and reported its pertinent recommendations which are consistent with the plan....A proposal which has been disapproved by the board may be enacted only by a 2/3 vote of the legislative body.

3. Appropriations. A municipality which has a planning board may raise or appropriate money and may contract with the State and Federal governments for the purpose of the comprehensive planning authorized by this subchapter....

3. Zoning Ordinance adopted

(7) 10,000 or over
All had zoning adopted. (Saco apparently zoned without having adopted a comprehensive plan.)

(5) 5,000 to 9,999
All had zoning adopted. (Cape Elizabeth, Rockland and Belfast apparently zoned without having adopted a comprehensive plan.)

(15) 2,500 to 4,999
9 had zoning adopted. (York, Wells, Kennebunk, Old Orchard Beach, Cumberland, Yarmouth, Bar Harbor, Ellsworth and Calais.)
(York, Wells, Kennebunk, Old Orchard Beach, Yarmouth and Ellsworth apparently zoned without having adopted a comprehensive plan.)

(21) 1,000 to 2,499
3 had zoning adopted. (Kennebunkport, Boothbay Harbor and Mt. Desert.)
(Mt. Desert apparently zoned without having adopted a comprehensive plan.)

(47) Under 1,000
1 had zoning adopted. (Owls Head zoned but apparently without having adopted a comprehensive plan.)

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39. 30 M.R.S.A. §4953. Zoning Ordinance

1. Scope. A municipality which has a planning board may enact a zoning ordinance dividing it into zones consistent with the proper development of the municipality. The zoning ordinance may regulate the following:

   A. Location and use of real estate for industrial, commercial, residential and other purposes;
   B. Construction, height, number of stories, area and bulk of all structures;
   C. Size and open spaces of real estate;
   D. Population density;
   E. Setback of structures along ways of public property.

2. Part of plan. A zoning ordinance shall be drafted as an integral part of a comprehensive plan for municipal development, and promotion of the health, safety and general welfare of the residents of the municipality.

(Cont'd)

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4. Subdivision Regulations adopted

(7) 10,000 or over
5 had subdivision regulations adopted. (Kittery, South Portland, Portland, Brunswick and Bath.)

(5) 5,000 to 9,999
4 had subdivision regulations adopted. (Scarboro, Cape Elizabeth, Falmouth and Rockland.)

(15) 2,500 to 4,999
2 had subdivision regulations adopted. (Cumberland and Yarmouth.)

(21) 1,000 to 2,499
1 had subdivision regulations adopted. (Searsport.)

(47) Under 1,000
None had subdivision regulations adopted.

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39. (Cont'd)

A. Among other things, it shall be designed to encourage the most appropriate use of land throughout the municipality; to promote traffic safety; to provide safety from fire and other elements; to provide adequate light and air; to prevent overcrowding of real estate; to provide a wholesome home environment; to prevent housing development in unsanitary areas; to provide an adequate street system; to promote the coordinated development of unbuilt areas; to encourage the formation of community units; to provide an allotment of land area innew developments sufficient for all the requirements of community life; to conserve natural resources; and to provide for adequate public services.

3. Enactment; public hearing. A zoning ordinance or amendment may be enacted only after a public hearing has been held by the planning board for its consideration at least 10 days before it is submitted to the legislative body. In towns where the legislative body is the town meeting, such legislative body may at a regular or special meeting thereof vote on the following question: Shall the municipal officers be authorized to enact and amend a zoning ordinance? If the question is voted on favorably said municipal officers may enact and amend from time to time a zoning ordinance. ...

40. 30 M.R.S.A. §4956. Land Subdivisions

1. Regulation. A municipality may regulate the subdivision of land.

(Cont'd)

5. Capital Improvements Program budgeted

(7) 10,000 or over
3 had capital improvements budgeted. (South Portland, Portland and Bath.)

(5) 5,000 to 9,999
1 had capital improvements budgeted. (Scarboro.)

(15) 2,500 to 4,999
1 had capital improvements budgeted. (Freeport.)

(21) 1,000 to 2,499
None had capital improvements budgeted.

(47) Under 1,000
None had capital improvements budgeted.

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40. (Cont'd)

A. Subdivision means the division into 3 or more lots in urban areas or 4 or more lots in rural areas, except this provision shall not apply to any divisions for agricultural uses including associated sales, service, processing and storage.

. . .

B. A register of deeds shall not record any plat of a proposed subdivision until it has been approved by the planning board and the approval noted on the plat. In a municipality which does not have a planning board, the municipal officers shall act in its stead for the purposes of this section.

C. Approval of a subdivision is based on its compliance with municipal ordinances and its general reasonableness....

See also, the text of a new statute (12 M.R.S.A. §4801 through §4806 as added by P.L. 1969, c.365) which sets a state imposed minimum of 20,000 square feet lot size on certain subdivision activity irrespective of either the total absence of local regulation or the presence of local regulation which is less stringent.

41. 30 M.R.S.A. §5201, 1A. Establishment

A municipality may establish a reserve fund, consisting of one or more accounts, by appropriating money or by authorizing the transfer of unencumbered surplus funds at the end of any fiscal year, for the following purposes:

1. Capital Improvement account.

A. Financing the acquisition or reconstruction of a specific, or a type of, capital improvement.

42

6. Building Codes adopted

(7) 10,000 or over
All had building codes.

(5) 5,000 to 9,999
All had building codes.

(15) 2,500 to 4,999
5 had building codes. (Old Orchard Beach, Cumberland, Yarmouth, Ellsworth and Bar Harbor.)

(21) 1,000 to 2,499
2 had building codes. (Wiscasset and Boothbay.)

(47) Under 1,000
None had building codes.

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42. 30 M.R.S.A. §2151, (4). Police power ordinances

A municipality may enact police power ordinances for the following purposes:

. . . .

4. Buildings, structures, trailers and equipment.

A. Regulating the design, construction materials and construction of new buildings and additions to and alterations of existing buildings; regulating the alteration, demolition, maintenance, repair, use, change of use, safety features, light, ventilation and sanitation facilities of all buildings, regulating sanitation and parking facilities for trailers, regulating the installation, alteration, maintenance, repair and use of all equipment in or connected to all buildings; requiring permits and establishing reasonable permit fees for all of the operations mentioned in this paragraph.

B. Establishing adequate standards for all features of means of egress, fire protection, fire prevention, accident prevention and structural safety of buildings which are used occasionally or regularly for public assembly; compelling the owners to make improvements to bring such buildings up to the established standards; [etc.]....

7. Housing Codes adopted[43]

(7) 10,000 or over
3 had housing codes. (South Portland, Portland and Bath.)

(5) 5,000 to 9,999
1 had housing codes. (Cape Elizabeth.)

(15) 2,500 to 4,999
None had housing codes.

(21) 1,000 to 2,499
None had housing codes.

(47) Under 1,000
None had housing codes.

ADEQUACY OF LOCAL EFFORT

Maine coastal municipalities are not large urban areas.[44] Those of 2,500 or above population are predominantly located in the southwestern one-third of the coast, with those of 2,499 or less being predominantly located in the northeastern two-thirds of the coast.

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43. See fn. 42.

44. 1966 population estimates of the seven coastal population leaders (i.e., those over 10,000 in 1960) are:

Portland	69,013
Biddeford	24,068
South Portland	23,334
Brunswick	18,629
Saco	11,273
Kittery	10,590
Bath	9,846

Maine DED, in the Maine Handbook - A Statistical Abstract - 1968, p.22-29, (State House - Augusta).
Note however, that these population estimates are of year-round residency, and do not reveal how urban-like many of these coastal municipalities can become during peak periods of the "recreation season" due to an onslaught of summer residents and summer visitors. An outstanding present example would be Old Orchard Beach with a year-round population of about 5,000 and a "peak of the season" population that may range from 50,000 to 125,000!

Thus, the Maine coast as a unit and particularly the northeastern two-thirds of the coast, is sparsely settled on a year-round basis.

Maine's coastal communities have available to them enough local authority to cope with many of the coastal "quantity and quality-access" problems previously discussed.[45]

Planning Boards

All municipalities greater than 2,500 in population had planning boards except Machias.[46] Geographically, the lower one-third of the coast was pretty solidly covered, the middle one-third was about one-half covered and the upper one-third (with the exception of Lubec, Eastport and Calais) was not covered at all.

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45. In addition to the statutory material quoted in fn.37 through 42, on the subject of municipal/local authority to regulate and control the access problems under consideration, see, e.g.:
30 M.R.S.A.
§1903 [Gifts of money or other property in trust.]
§2151 [Regulation to promote general welfare, etc. public ways and other public property, vehicles and commercial activities as well as structures as noted in fn.41.]
§2451 et seq. [Regulation of auto junk yards.]
§2701 et seq. [Regulation of innkeepers, victualers and lodging houses.]
§3251 et seq. [Regulation of severally owned ditches, marshes, meadows, and swamps.]
§3451 et seq. [Regulation of fencing.]
§3552. "Recreation - A municipality may acquire and maintain real estate and personal property for recreational purposes, and may establish and conduct a recreational program..."
§3553 [Improvement of navigation and prevention of erosion.]
§3751 et seq. [Acquisition, development, maintenance and operation of municipal forests.]
§3801 et seq. [Acquisition, etc. of open areas, public parks and playgrounds.]
§4101 et seq. [Acquisition, etc. of public dumps.]
§4251 et seq. [Acquisition, etc. of municipal water and sewage systems.]
§4552 et seq. [Acquisition, etc. of housing projects.]
§4801 et seq. [Acquisition, etc. in connection with urban renewal.]

The absence of a planning board does not necessarily mean a total lack of such activity, (See, e.g. the savings provision of 30 M.R.S.A. §4957 for municipalities without a planning board), but is a very strong indication of it.

An effectively operating planning board is both the logical[47] and perhaps the legal[48] prerequisite to the use of any of the specific land use control devices shown to be available. It is not surprising that no community without a planning board had zoning, subdivision regulations, capital improvements budgeting, or building or housing codes.

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46. It is interesting (and many might feel, frightening) to note that both Machias and Machiasport drew complete blanks as to formal planning, yet these two communities are among the focal points at present, of an oil industry onslaught.

47. The Corporation Counsel for the City of Portland summarized the requisites and benefits of a good planning board as follows:
    1. The appointments to the board should represent truly interested citizens with backbone and if need be, the will to fight;
    2. Diverse geographic and economic interests should be represented;
    3. Willingness and ability to use outside professional assistance to assure the best technical help available, while the board maintains its role as municipal representatives;
    4. Willingness to use model ordinances as guides, but to recognize the peculiar needs of the community;
    5. Willingness to listen at public hearings on planning proposals, not only to effectively meet opposition but if need be, to incorporate the best of ideas to be gleaned in any necessary compromise.
    6. Good political presentation should be used to allay fear of, as well as assure passage of good planning proposals.

    B. Shur, Practical Problems in Local and Regional Zoning, in the Bowdoin Study of Prospects and Perspectives, p.84-85.

48. See Grondin v. Inhabitants of Eliot, (York Superior Court, Me. 1969) holding that a prohibition against mobile homes was void in the absence of general planning and zoning (but suggesting that such a blanket prohibition might be invalid even if part of a more comprehensive plan.) See also O. Delogu, "Are Maine Zoning Laws Legal?" Maine Times, June 27, 1969.

Comprehensive Plan

Of the 27 municipalities with a population greater than 2,500, only 13 had adopted a comprehensive plan. Of the remaining 68, with a population less than 2,500, only 4 had adopted a comprehensive plan. Geographically, the lower one-third of the coast was about one-half covered and the upper two-thirds (with the exception of Camden, Bar Harbor and Calais) was not covered at all.

The impact of the lack of a comprehensive plan is not clear. For example, a municipality need not have adopted a comprehensive plan in order to enact valid land usage control (see e.g., Savings Provision, 30 M.R.S.A. §4957). The lack of a plan does, however, have certain adverse legal and practical effects.

Once municipal land use control was given a stamp of approval by the U.S. Supreme Court in 1926,[49] states began to cast about for ways in which to enable municipalities to engage in such control. The primary model for most of the enabling legislation which quickly followed was the Standard State Zoning Enabling Act of the Department of Commerce (1926)[50] which Act contained in its Section 3 the following: "Purposes in View -- Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; etc."[51] [Emphasis supplied]. Maine's present zoning

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49. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L. Ed. 303 (1926).

50. See C. Haar, "In Accordance with a Comprehensive Plan" in 68 Harv. L. Rev. 1154 (1955) at 1155-1156.

51. As reported in J. Krasnowiecki, Ownership and Development of Land, (Foundation Press, Inc. - 1965), p.483.

enabling ordinance is strongly colored by this Standard Act, i.e., "A zoning ordinance shall be drafted as an integral part of a comprehensive plan for municipal development, and promotion of the health, safety and general welfare of the residents of the municipality."[52] [Emphasis supplied].

Language such as that emphasized above has perplexed many city planners and legal writers (if not courts). Tentative definitions of a formal comprehensive plan have emerged.[53] There has not, however, been any clear cut judicial requirement of a preexisting formal comprehensive plan when the validity of such common land usage control as zoning has been judicially challenged.[54] However, it is at least possible that municipal land use controls will be required to be tied directly to a formal comprehensive plan in order to be sustainable on challenge.[55] Thus, the

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52. 30 M.R.S.A. §4953 (2). See fn. 39 supra, for additional text.

53. See, e.g., P.L. 90-448 Sec. 701(i)(4) (Housing and Urban Development Act of 1954, comprehensive planning definition.) 5 M.R.S.A. §3305, I.B. (Supp.) (Definition of Maine Comprehensive Plan for State Planning Office Purposes), as well as 30 M.R.S.A. §4952 (2) (Definition of Maine municipal comprehensive plan as noted in fn. 38.).

54. For studies of the apparent judicial definitions of the comprehensive planning requirement and comprehensive planning itself, and some suggested ramifications as to these judicial ambiguities as well as suggested legislative solution, see C. Haar, supra, fn. 50, p.1154-75, and J. Krasnowieski, supra, fn. 51, p.479-505.

55. As to Maine, see e.g., O. Delogu, Suggested Revisions in Maine's Planning and Land Use Control Enabling Legislation, in 20 Maine L. Rev. 175 (1968): "Land use control ordinances or programs involving public, land use oriented, capital expenditures shall not be finally acted upon by the governing body of a municipality before a comprehensive plan is adopted." at p.192. Note that traditional doctrine, the "Dillon Rule", narrowly construed grants of power to municipalities: "Any fair, reasonable, substantial doubt concerning the (Cont'd)

1968 case[56] which, in the absence of overall zoning or planning, held invalid an ordinance prohibiting all mobile homes, should be constrasted with Wright v. Michaud.[57] In the latter case, Maine's Supreme Judicial Court upheld the validity of the Town of Orono's comprehensive zoning ordinance, which prohibited any individual mobile home from locating in any zone, but permitted the creation of mobile home parks as an exception in the Residence and Farming Zone, upon approval of the Board of Appeals. It may be significant that the Court emphasized that:

> The provisions of the Enabling Act delegate broad police powers to municipalities to adopt zoning ordinances as an integral part of a comprehensive plan for municipal development and promotion of the health, safety, and general welfare of its inhabitants. (At p.168; Emphasis added.)
>
> With the development of the law of zoning and the inclusion in enabling acts of provisions for comprehensive planning for municipal development there has been a tendency to broaden the scope of the meaning of the term "general welfare" in determining the purposes for which zoning ordinances may be enacted. (At p.172; Emphasis added.)
>
> In considering the provisions of a comprehensive zoning ordinance.... (At p.173; Emphasis added.)

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55. (Cont'd) existence of power is resolved by the courts against the corporation, and the power is denied." J. Dillon, Municipal Corporations 448-50 (5th Ed. 1911). This rule would seem to have no application to the expressly granted powers discussed above. But see O. Delogu, supra, p.177-78, suggesting an express repudiation of the "rule" in all land use legislation.
    On the requirement of a "public use" for land use control and related activities, see, e.g., Crommett v. Portland, 150 Me. 217, 107 A. 2d 841 (1954) discussed in this Report, Vol. II, p.359 et seq. and Opinion of the Justices [Re Bangor Industrial Development Act], 152 Me. 440, 131 A. 2d 904 (1957) discussed in this Report, Vol. II, p.359 et seq.

56. Grondin v. Inhabitants of Eliot, fn. 48 supra.

57. 160 Me. 164, 200 A. 2d 683 (1964).

> We believe it was the intention of our legislature in enacting the Enabling Act to allow municipalities to plan for the future. The test is whether the prohibition is unreasonable, arbitrary, or discriminatory based upon the reasonably foreseeable future development of the community. (At p.176; Emphasis added.)

It is arguable whether the two cases can be reconciled,[58] although the facts differ significantly.

More important, the Court has acknowledged that the sort of coastal "quantity and quality-access" problems previously discussed, including a preservation of aesthetic values, are "general welfare" type problems and can be the subject of legitimate land usage control measures.

The Wright case uses the phrases "integral part of a comprehensive plan" (at p.168) and "comprehensive zoning ordinance" (at p.173) interchangeably; it is impossible to say whether a "comprehensive plan" is a step, or a document, different from the comprehensive zoning, and if so, whether there is any required time sequence.[59] But the DED Study of 1966[60] revealed Orono reporting that it had a planning board, a comprehensive plan, a zoning ordinance, subdivision regulations, capital improvements budgeting and both building and housing codes. Eliot reported only the establishment of a planning board.

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58. See O. Delogu, "Are Maine Zoning Laws Legal?" Maine Times, June 26, 1969, p.21.

59. This sort of perplexity as to the treatment of planning within the context of judicial decisions is one of the prime concerns and targets of Professors Haar and Krasnowieski, supra, fn. 54.

60. Progress in Maine Municipal Planning, p.10-11.

Leaving aside the question of whether the absence of a formal comprehensive plan makes a difference in a court room, there are other areas where the lack of such a plan may very well be of equal or graver importance to coastal communities. Federal funding programs, as discussed earlier, will not be readily available, if at all, absent a comprehensive plan, or at least meaningful comprehensive planning activity.

Further, and of the most importance, a coastal community without a governmentally implemented plan will be leaving its section of the coast entirely to the ad hoc "planning" decisions of the private sector (or perhaps various public sectors at cross-purposes and out of communication). This type of non-planning, which leaves decisions to the profit motive, has not been overly kind to "unique natural resources." Even if there is a plan of the sort that might be said to be "locked in the hearts of the city fathers", there is no citizen involvement and no community basis on which to base predictions and judgments.

Zoning, Subdivision Regulations, Capital Improvement, Budgeting, and Building and Housing Codes

Zoning

Of the 27 municipalities with a population of 2,500 or greater, 21 had some form of zoning. Of the remaining 68 with a population of less than 2,500, only 4 had some form of zoning. Geographically the lower 1/3 of the coast (with the exception of Freeport) had zoning, and the upper 2/3rds (with the exceptions of Boothbay Harbor, Rockland, Owls Head, Belfast, Ellsworth, Mount Desert, Bar Harbor, and Calais) had no zoning.

Subdivision Regulations

Of the 27 municipalities 2,500 or larger, only 11 had adopted

subdivision regulations. Of the remaining 68, only 1 had adopted subdivision regulations.

Geographically the lower one-third of the coast was approximately one-half covered and the upper two-thirds (with the exceptions of Rockland and Searsport) had no subdivision regulation.

Capital Improvements Budgeting

Of the 27 municipalities 2,500 or larger, only 5 had such budgeting. Of the remaining 68, none had such budgeting.

Geographically, the lower one-third of the coast was less than one-third covered and the upper two-thirds had no such budgeting.

Building Codes

Of the 27 municipalities 2,500 or over, 17 had building codes. Of the remaining 68, only 2 had building codes.

Geographically, the lower one-third of the coast was approximately two-thirds covered by building codes and the upper two-thirds (with the exceptions of Wiscasset, Boothbay, Rockland, Belfast, Ellsworth and Bar Harbor) had no building codes.

Housing Codes

Of the 27 municipalities 2,500 or larger, only 4 had housing codes. Of the remaining 68, none had housing codes.

Geographically, the whole coast (with the exceptions of South Portland, Portland, Bath and Cape Elizabeth) lacked housing codes.

Both in terms of numbers of municipalities and, even more strikingly, in terms of geographic spread along the coast, the basic planning tools are being neglected. One must conclude that access to the coast and the quality of the coast are basically unprotected.

Why Is There Such A Lack of Local Planning Efforts By Maine Coastal Communities?

Why was the upper two-thirds of the coast virtually without public control, and the lower one-third controlled at far less than the expectable level?

1. Apathy,
2. Failure to perceive the need,
3. Fear of and revulsion at any public encroachment on private property,[61]
4. Lack of faith in honest enforcement,[62]
5. Inadequate municipal funds,[63] and
6. Instances of poor municipal leadership.

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61. See, e.g., O. Delogu and D. Gregory, Private Property and Public Regulation in Maine, in Part 1: Planning and Law in Maine. (Me. Agricultural Experiment Station - University of Maine Bulletin 653 November, 1967) 19pps., as well as B. Shur, Practical Problems in Local and Regional Zoning, in the Bowdoin Study of Prospects and Perspectives, p.82-85.

62. Everybody knows (or thinks he knows) zoning, subdivision, building code systems where citizens "in favor" go unchecked and those "not in favor" are victimized by overly harsh enforcement.

63. Public funds are derivatives of the private sector. For a concise but thorough and informative recent study as to the status of Maine's private income gatherings vis-a-vis the other states in New (Cont'd)

Coastal Development -- Fiscally Advantageous to Municipalities?[64]

A recent article indicates the dollars-and-cents sense of sound municipal planning from the multiple viewpoints of tax revenues, municipal expenditures, attraction of tourists, and pollution prevention and conservation.

> The author asks as lead-in questions "how much actual benefit is there in seasonal development? Does it pay its own way?" [at p.5] He proceeds to examine hypothetical planned development of a hypothetical municipal coastal site of 10,000' frontage on marsh, clam flat and deep water and the development's possible impact on municipal income, municipal expense and community income taken in four possible settings and at stages of development up to fifteen years.
>
> Very briefly the four possible settings of development chosen were:
>
> 1. Traditional equal subdivision abutting the shore. [at p.6]
> 2. Traditional equal subdivision with a 100 foot deep land guard corridor as community property of the owners, public property or whatever might be appropriate, i.e., traditional subdivision but with building no closer than 100' from the shore. [at p.6]
> 3. Cluster housing as opposed to traditional subdivision with the 100' land guard corridor maintained and added to be a 200' deep strip of this frontage carrying restricted non-building rights (the owner might clear, beautify, etc. his portion of the 200' restricted strip but not build on it), i.e., cluster housing no closer than 300' from the shore. [at p.7]
> 4. The same as 3 [supra] with a small town park located on a headland non-building area having possible day-use and camping facilities. [at p.7]
>
> The author then takes standard estimated municipal expenses and gains [at p.7] with standard estimated community gains [at p.9] all in dollars and interpolates municipal gains and community gains in dollars in the four possible settings over 15 years with and without some year-round residency having taken place. [at p.8]

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63. (Cont'd) England and the nation, with some suggested solutions aimed at "closing" the obvious and sizable "gaps", see, E. Miller, Maine's "Income Gap" -- What It Is And How It Can Be Closed. (Me. DED - Augusta, Maine, August, 1968) 12 pps.

64. John McKee, "Coastal Development" Maine Townsman, Hallowell, Maine, July, 1969, p.5-10, 17.

> The results indicate that of the four possible settings [supra], they are desirable, if at all, in inverse order, i.e., 4,3,2, and 1. Primary reasons for this are that:
>
> 1. The 100' land guard corridor with the additional 200' non-building area will assure the landowner that no one will build in front of him just as positively as if he had been able to build abutting the shore to begin with. Therefore, he will be willing to pay as high an acquisition price and property tax as an abutting owner would.
> 2. With property owners further back from shore (assuming a lack of municipal sewerage facilities), sewerage pollution will not blight the shore, particularly as to income producing clam flats.
> 3. Cluster housing maintains the same or better quality of housing but will allow at least 10% more housing on the same amount of land (raising the taxable property base) while lowering the municipal cost for services such as road maintenance and water because the housing is a more compact unit.
> 4. A town park should bring in day-use and camper revenue (accommodation charges; local spending by tourists, etc.)
>
> The author further notes that the possibility of year-round residency brings diminishing returns to municipal coffers mainly because of increased schooling and snow removal expenses. He poses, in this light, the attractiveness of a 5th setting, i.e., no residential development and developing the town park on a much larger scale combined with the possible establishment of a "fairly modest motel" [at pps.10,17] He ends by stating: "What this study suggests, then is that although a town need not necessarily discourage development of its shorefront resources--at least not on strictly economic grounds--the town runs a big risk if it does not make sure that every subdivision going in meets the most rigorous standards. Bad development is costly.
>
> And where there is any possibility of eventual year-round use of a subdivision, the town might be a lot better off with a park rather than the subdivision.
>
> It's a question not only of pollution control and of maintaining property values, but of keeping the town an attractive place to live in and to visit. It turns out that's worth money." [at p.17].

Perhaps no community fits Mr. McKee's hypothetical model perfectly. It is difficult to believe, however, that there is any community which could not profit by the same sort of cost-benefit analysis he applied. And it is impossible to believe that there is any community which would

not be better off, financially as well as aesthetically, if it adopted and enforced plans based on a good faith effort to make such an analysis.

REGIONAL EFFORTS

There are obvious advantages in enlarging the planning area beyond municipal boundaries. Coastal problems do not conform themselves to political boundaries, they are regional problems, capable of satisfactory solutions only as a result of regional or state effort. In addition, regional efforts of this nature, as opposed to uncoordinated municipal attempts, can provide a broader base of concerned citizenry as a possible source of greater experience and expertise and the possibilities of individual cost saving through collective cost sharing.

The advantage of attacking geographically regional problems on a regional basis is always present no matter what the population or fiscal base of the regional constituent membership. The pooling advantage of regional efforts (i.e., experience, expertise and funds) can, of course, become increasingly important, the smaller the population or fiscal base of the municipalities within the region.

As had been noted earlier, present federal funding available for local planning purposes increasingly encourages planning on a regional and coordinated basis (see, e.g., fn.28) and Maine and other states have responded to this encouragement by enabling municipalities to join in regional planning efforts.[65]

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65. As to the trend on a national level:
    1. There is a significant trend toward the formation of voluntary regional groups, with 80 new ones having been formed in the last year. (Cont'd)

65. (Cont'd)

2. The average percentage of elected officials on governing boards has increased from 57 to 64%.
3. There is a definite trend toward restructuring regional planning commissions into COG type groups. [Council of Governments]
4. The average total staff is 12.1 per council.
5. Increasing numbers of regional councils are becoming involved in social areas, and are involving citizens in the decision making process.
6. Budgets have increased from an average of $212,974 to $256,529 in one year.
7. The number of councils receiving State assistance increased from 35% to 50%.

NSRC Survey, in the Newsletter of Greater Portland Regional Planning Commission and Council of Governments. (1969. 562 Congress St., Portland, Maine) Vol. 1, No.3, p.5.

As to the trend on the State level, compare Progress in Maine Municipal Planning - 1956-1966, (Id. n.33) at p.23 where it was stated : "at the present time (September 1966) there are four regional commissions in Maine - the Androscoggin Valley, The Greater Portland, the Knox County, and the York County. These four commissions are actively engaged in the preparation of comprehensive regional development plans for areas including a total of seventy towns and cities with a 1960 population of 360,956 representing 37.2% of the total population of the State....

The authorized planning costs for these projects to date are:

Local	State	Federal	Total
$69,395	$44,812	$216,304	$330,511

In addition there have been special studies authorized for planning purposes in the Penobscot Bay Area, in the Maine-New Hampshire Seacoast Area and for Outdoor Recreation state-wide. The costs of these studies have been shared by the State and Federal Governments as follows:

	State	Federal	Total
	$91,835	$123,995	$215,830

A summary of authorized regional planning costs is therefore:

Local	State	Federal	Total
$69,395	$136,647	$340,299	$546,341 "

with the State Planning Office, Regional Planning Commissions in Maine - January 1, 1969 which lists, in addition to the four above (existing as of September 1966), seven new regional planning commissions that apparently have been formed during the past three years. (North Kennebec, Penobscot Valley, Northern Maine, Southern Kennebec Valley, Bath-Brunswick, Schoodic Peninsula, and Washington County.).

Present Maine legislation enabling regional planning is found in 30 M.R.S.A. c.239, §1 (§4501-4505) entitled "Regional Development."[66]

A comparison of enabled regional planning (30 M.R.S.A. §4501 through §4505, text at fn. 66 supra, with enabled municipal planning (30 M.R.S.A. §4951 through §4957) reflects similarity of language as to goals. But regional planning commissions, their plans and their recommendations appear to have no effective status of their own; they have only an advisory position, and implementation is left to the municipal members (§4504 (4)). Maine regional planning is thus not a strong device, notwithstanding its obvious potential advantages. The practical results available thus far bolster this observation, at least as to most of the coastal communities heretofore under study.

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66. Note: In the following text, underlining indicates additions in 1969, P.L. 1969, c.382.

30 M.R.S.A. §4501

A municipality which has a planning board may join in a regional development and for coordination with state and federal planning and development programs:

1. Districts. The Governor may designate regional planning and development districts when he finds any of the following conditions:

A. There exists with the proposed district a clear need to plan and develop its physical, economic and social resources; or

B. There exist special or acute [named problems] or other physical or social or economic problems of a regional character; or

C. The proposed district meets other reasonable conditions consistent with the purposes of this chapter.

In establishing standards and determining boundaries the Governor through the State Planning Office shall afford all affected parties adequate notice and an opportunity to present relevant information, and give appropriate consideration to geographic, demographic, social and economic inter-dependent communities.

(Cont'd)

66. (Cont'd)

2. Revision. The Governor may, after consideration with the State Planning Office and the officers of the municipalities and counties involved, revise the designation of districts to reflect changing conditions or otherwise to fulfill the purposes of this chapter.

3. State Agency Assistance. The State Planning Office shall assist interested municipalities and counties in arranging for designation of planning and development districts and will coordinate the resources of other state agencies for such assistance.

4. Agreements. The Governor, with the consent of the United States Congress, may enter into agreements on behalf of the State with the governor or premier of an adjoining state or province of Canada to establish interstate or international regional planning or development districts.

§4502

...The Commission shall be composed of 2 or more member municipalities, counties, and where wild land or unorganized townships are involved [various State agency heads involved in the new "Use Regulation" law (12 M.R.S.A. c.206-A) to be discussed presently].

...The commission shall prepare an annual budget and shall determine on an equitable basis the amount to be paid by each member....

A. [Failure to pay terminates membership]
Planning. A member may raise or appropriate money and furnish necessary services for the use of the commission. A member may contract with the commission for the furnishing of funds or services in the preparation of a comprehensive regional plan, and for special planning work to be done by the commission for the member.

§4503. Representation

1. ...Appointments to the commission shall be made by the municipal officers from nominations of residents submitted by the planning board as follows.

A. [Representation to be at 2 for up to 20,000 population but "no more than one of whom shall be a resident currently holding elective office in the municipality;" 3 for up to 100,000 "no more than one of whom (etc.)" and 4 for more than 100,000 "no more than 2 of whom (etc.)"].

§4504. Powers and duties

1. ...

A. [Jurisdiction is area of membership]

B. The power of the commission is advisory and pertains generally to the development of the whole region, or to the solution of a problem which involves more than one member (Cont'd)

66. (Cont'd)

2. Organization.

. . . .

3. Comprehensive regional plan.
   A. The commission shall prepare a comprehensive regional plan containing its recommendations for the development of the area within its jurisdiction.
   B. ...to promote...health, safety, and general welfare....
   C. Among other things, it shall be designed to encourage the most appropriate use of land;...to provide adequate transportation and communication;...to encourage the development of adequate recreational areas....
   D. Among other things, the commission may make recommendations for the use of land; the general location, extent, type of use, character, and development of public ways, public property...and for the improvement, redevelopment rehabilitation and conservation of industrial, commercial, residential and other areas.

. . . .
. . . .

4. Local assistance.
   A. The commission may make recommendations on the basis of its plans and studies to any planning board, to the municipal officers of any member, and to any county, state or federal authorities.
   B. A municipal planning board may adopt all or part of the regional plan which pertains to the area within its jurisdiction as its own comprehensive plan, subject to sections 4951 to 4956.

. . . .
. . . .

§4505 Community and rural development districts

1. ...Any community or rural development district authorized under federal legislation shall be organized and have those powers and duties provided under this subchapter.
2. ...No community or rural development district shall be formed where a regional planning commission has been legally constituted.
3. [Regional planning commissions may] apply for assistance under the community or rural development programs.

See also, 5 M.R.S.A. 3305, (1)(D), "...The State Planning Office may assist in forming regional planning commissions and <u>councils of government</u> and may assist with financing the cost of operation of such regional planning commissions established under Title 30, Section 4501-4503, <u>and of councils of governments empowered under Title 30 §1983, §§3</u>. Participation shall be limited to half of the non-Federal share of a federally assisted project or one-third of a non-federally assisted planning operation." [Emphasized language indicates new legislation.].

In footnote 65, it was noted that as of January 1, 1969 there were 11 regional planning commissions in existence in the State. Seven of these commissions appear to be so located as to include many of the 95 "open waters" communities previously studied. This would be particularly important as to the upper two-thirds of the coast which is, for the most part, sparsely settled and was demonstrably devoid of effective local planning efforts. Proceeding roughly in a northeasterly direction, the seven regional commissions are York County, Greater Portland, Southern Kennebec Valley, Bath-Brunswick, Knox County, Schoodic Peninsula and Washington County.

However, a very recent study reveals that as to municipalities participating in regional planning, the lower one-third of the coast is covered and the upper two-thirds (with the exceptions of Cushing, St. George, Rockland, Camden, Sullivan, Gouldsboro, Winter Harbor, Lubec, Eastport, Perry and Calais) is not covered.[67] As to what has been done in regional water resources planning (i.e., water supply and sewage facilities):

> Water resources planning in Maine is characterized by independent activities upon the part of municipalities and industry. To date there has been little effective cooperation between adjacent communities on common problems which lend themselves to solutions based on intergovernmental cooperation and joint facilities. Attempts at regional or joint planning have resulted in little constructive progress for three primary reasons. There is a lack of trained leadership capable of defining real priority problems and developing workable solutions. There is a lack of money and an

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67. Edward C. Jordan Co., Inc., Portland, for the State Planning Office, in Maine Water Resources Plan - Water Supply and Sewerage Facilities Vol. 1. (February 1969) p.76.

> inadequate financial basis for raising the funds necessary to support planning on a continuing basis. There is an unwillingness by locally autonomous communities to accept sincere cooperation with neighboring communities as being capable of producing better results than independent parochialism.[68]

Once again we find the familiar pattern of the lower one-third of the coast being "covered" (quantitatively if not qualitatively) and the upper two-thirds being left effectively "bare". Regional planning in Maine seems, further, to meet the same problems found at the local level, such as poor or inexpert leadership, lack of funds, and basic distrust of all forms of land usage control (i.e., "the supreme right of private property") to which is added "independent community parochialism" as some sort of last bastion against the encroachments of government.

The State has recently attempted a new effort to salvage and encourage regional efforts. The 104th Legislature (1969) enacted "An Act Relating to Regional Planning and Establishing Regional Councils of Governments"[69] which represents the new State effort.

The first part of the Act deals with regional planning and makes substantial additions to the regional planning enabling legislation. These additions are incorporated in the text set out in footnote 66, and include:

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68. Id. at p.75.

69. P.L. 1969, c.382.

1. The Governor and at least one of his executive arms, the State Planning Office, may now be deeply involved in an effort to encourage and coordinate regional planning efforts as well as possible interstate and international planning efforts.

2. An attempt is made to avoid or blunt "independent community parochialism" by giving affected parties notice and an opportunity to be heard.

3. County governmental units (and State agency heads where appropriate), as well as municipal units have the right to representation in regional efforts.

4. An attempt is made to insulate regional planning from municipal politics by limiting the number of municipal elective officeholders who may serve as regional representatives.

Note, however, that implementation is still a matter for each municipality.

Despite the strengthening of regional planning by, in substance, permitting the Governor's office to impose it on areas which have not voluntarily created a regional commission (under 30 M.R.S.A. §4501), the same Act created a new instrumentality which, by its terms, may supplant such regional planning commissions. A new Chapter 204, the text of which is set out below, is added to Title 30, authorizing "Councils of Government."[70]

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70. 30 M.R.S.A. §§1981 ff. (added by P.L. 1969, c.382).
Councils of Government

§1981 Establishment
The municipal officers of any 2 or more municipalities by appropriate action may enter into an agreement, between or (Cont'd)

70. (Cont'd)

among such municipalities, for the establishment of a regional council of governments.

§1982 Contents of agreement

The agreement shall provide for representation, provided that at least half of the representatives of each member shall be municipal officers. The agreement shall specify the organization, the method of withdrawal, the method of terminating the agreement and the grounds for suspension of member municipalities.

§1983 Powers and duties

1. ...
   A. [Study common area problems] including but not limited to matters affecting health, safety, welfare, education, economic conditions and regional development;
   B. Promote cooperative arrangements and coordinate action...
   C. Make recommendations for review and action to its members and other public agencies that perform functions within the region.
2. ... The council may, by appropriate action of the governing bodies of the member municipalities, exercise such other powers as are exercised or capable of exercise separately or jointly, by the member governments and necessary or desirable for dealing with problems of local concern.
3. ... The council may, by appropriate action of the governing bodies of the member municipalities establish a standing committee for the purpose of preparing and maintaining a comprehensive regional plan.
4. Transfer. Where a regional planning commission has been established under Chapter 239, subchapter 1 [30 M.R.S.A. §§4501 ff.], the member municipalities, by appropriate action, may provide for the transfer of all assets, liabilities, rights and obligations of the commission to the council and for the dissolution of the commission.

§1984 By-laws

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§1985 Staff

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§1986 Finances; annual report

1. Expenses. The governing bodies of the member governments may appropriate funds to meet the expenses of the council. Services of personnel, use of equipment and office space, and other necessary services may be accepted from members as part of their financial support.
2. Governmental funds. The council may accept funds, grants, gifts and services from [U.S., State, any other governmental unit, private and civic sources].
3. [Mandatory annual report].

Note, in particular, that the Council may exercise authority (30 M.R.S.A. §1983 (2)) as well as performing study and planning functions, including comprehensive regional planning. Thus, specific provision is made for transferring the functions of a regional planning commission to a Council. Given a broad enough delegation from the constituent municipalities, therefore, the Council of Governments has considerable potential for a wide range of planning and operating governmental activities being carried on at the regional level.

The Councils of Government are thus to be contrasted with the previously enacted authority for "Interlocal Cooperation"; as appears in the provisions set out below,[71] that statute permitted transfer of specific functions to a joint agency established by agreement.

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71. 30 M.R.S.A. §§1951 ff., c.203. ("Interlocal Cooperation") enables municipalities to join with other municipalities and State and Federal agencies:

§1951 ...to permit municipalities to make the most efficient use of their powers by enabling them to cooperate with other municipalities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.

In §1953 is provided that:

> Any power or powers, privileges or authority exercised or capable of exercise by a public agency [including a municipality] of this State may be exercised jointly with any other public agency of this State, or of the United States to the extent that the laws of the United States permit such joint exercise. Any agency of State Government when acting jointly with any public agency may exercise all of the powers, privileges and authority conferred by this chapter upon a public agency.
>
> The joint or cooperative action shall be by agreement approved by appropriate action by ordinance, other (Cont'd)

"Interlocal cooperation" appears oriented toward the solution of specifically definable area problems such as public schooling and the supplying of other local services such as water, sewerage disposal and treatment, snow removal, fire fighting, local law enforcement; it assumes informal agreement on the solution before the formal agreement is reached.

Under Councils of Governments, the intergovernmental unit has planning and investigating authority, making it the probable source for subsequent recommendations that specific functions be performed on an area-wide basis. Given sufficient delegations of authority by the constituent municipalities, Councils of Governments offer a medium through which most local governmental functions could be performed by a regional agency.

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71. (Cont'd)
action of the participating public agencies and by the Attorney General before any such agreement may enter into force.

§1953 gives detailed list of "Specifications" of the contents of such agreements, while making clear that joint ventures will not per se relieve a public agency of any of its legal obligations except to the extent of actual and timely performance of the obligation by an entity created by the agreement thereunder.

§1954 requires that an agreement be filed with the clerk of each municipality and with the Secretary of State.

§1956 provides that "any public agency [in an 'agreement'] may appropriate funds and may sell, lease, give or otherwise supply the administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking by providing such personnel or services therefor as may be within its power to furnish."

Since the three sets of statutory provisions -- regional planning, interlocal cooperation, councils of government -- overlap, but have some distinctive features, they should be viewed as a package, affording:

-- A medium for voluntary regional planning,
-- A medium whereby regional planning can be initiated by State Government,
-- A medium whereby the whole range of regional governmental problems may be examined,
-- A medium for the transfer of local governmental functions to a specialized or general regional agency.

But still, implementation depends on the consent of each municipality concerned.

STATE EFFORTS

There has been no significant, effective, direct State participation in coastal planning and management on a scale commensurate with Maine coastal problems and potentials. There are clear signs that State government will become a major factor in coastal activities in the near future. The State Planning Director[72] recently said:

> ...Science and engineering are not the only tools. Their wise and prudent use are necessary prerequisites but alone are insufficient to accomplish the final task. The planning and management of our coastal lands, shaped by administrative, political, and legal framework to promote an optimum balance among uses and conservation, involves major decisions of public policy.
>
> ...The large area of coastal land and the extensive marine environment requires a large scale comprehensive approach for adequate solution to its problems.
>
> It is necessary then to strengthen the state role and improve coordination among the participating elements so as to protect the public interest. Possible state zoning

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72. See Vol. I, p.15 et seq. of this report.

> of land and permits for explicit projects plus comprehensive and continuing planning for the coastal areas all have a place, but none will be effective until this State is prepared to enforce difficult decisions.[73]

The emphasis on State-wide planning and control is clear.

Maine Coastal Development Plan

On October 19, 1969, President Nixon's office released the Details of Five Point Interim Marine Science Program[74] which is apparently based on the findings and recommendations of Our Nation and the Sea.[75] Point number one of the five is Coastal Zone Management:

> Legislative proposals will be submitted to the Congress to establish a national policy for the development of coastal areas and to authorize Federal grants, with matching State contributions, that will encourage and facilitate the establishment of State management authorities....
>
> Grants are anticipated for (1) initial development by states of planning and regulatory mechanisms; and (2) operations of the State management systems that are developed....
>
> States have responsibility for management of coastal resources but have often lacked regulatory and management capabilities. They have been faced with a diversity of coastal jurisdictions and the absence of ecological information. This program should thus strengthen the State's capabilities, lessen the need for Federal intervention, and facilitate integration of planning, conservation, and development programs among diverse public and private interests.[76]

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73. P.M. Savage, An Approach to the Preservation of Maine's Coastal Resources, p.3-4, State Planning Office, Augusta, Maine, June 15, 1969.

74. Executive Office of the President, National Council of Marine Resources and Engineering Development, Washington, D.C. 20500.

75. See fn. 11 supra.

76. See fn. 74.

The federal inducement may be responsible for Maine's issuance, one month later of a "top-priority" Work Program for a Maine Coastal Development Plan.[77]

The Program constitutes a firm basis for effective and thorough Maine coastal planning. Further, it seeks results in a minimum time period, with an interim plan scheduled for no later than December, 1970 and a final plan late in 1971. Ignoring any other doubts, it is clear that the success of this Work Program will finally depend on the availability of adequate means of implementation. A plan, standing alone, has no effect.

State Government Means of Implementation

As fully discussed above, municipalities have the power to implement their plans through zoning, subdivision control, and similar means of enforcement. With minor new exception, discussed below, the State government has no such means to implement its plans. Yet its power to enact such means cannot seriously be questioned: where zoning and the like exist at the local level, it is as a result of a delegation from the State. Maine's legislature recently considered and rejected a proposal for State land use controls.[78] However, it seems clear that some version of the same legislation will be reintroduced at the next legislative session. To make any State coastal plan effective, it would seem essential to have at least the following statutory provisions:

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77. Issued by Maine State Planning Office, and reproduced in full in Appendix B to this Chapter.

78. See Maine Legislative Document No. 908 dated February 19, 1969 set out in pertinent part in Appendix C to this Chapter.

1. Mandatory zoning and subdivision control within all areas up to one mile inland of all "wetland areas."
2. A State agency with authority to zone and impose subdivision controls in default of municipal zoning, in the mandatory area.
3. Provision for moratoria on development of selected areas if harm is threatened, pending promulgation of zoning and other controls.
4. Considering the importance of fair and effective control over development of the coast, there should be provision for pre-enactment public hearing and provision that regulations found by a Court to be excessively restrictive on land use be remanded for administrative modification, rather than totally voided.

State-level implementation of planning is not completely unknown in Maine. A recent statute provides for State land use control in "unorganized" areas of the State.[79]

We have already commented at length on the Wetlands Control Board's power over modifications of coastal wetlands.[80] At its Special Session (February, 1970) the Legislature enacted a statute[81] requiring the

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79. 12 M.R.S.A. §681-689 added by P.L. 1969, c.494 authorizes the creation of a Maine Land Use Regulation Commission and authorizes the Commission to zone and provide subdivision controls in unorganized and deorganized townships and mainland plantations of the State. It thus has no direct bearing on the coast, where municipalities are all organized. But as the State's first venture into zoning and subdivision control, it suggests the possibilities of the same sort of power being exerted on the coast.

80. Vol. I, p.53 et seq.

81. 38 M.R.S.A. §§481 through 488 added by P.L. 1969, c.571.

approval of the Environmental Improvement Commission for the location of any new industry likely to adversely affect the environment.

But Maine still lacks any means of implementing a comprehensive plan, either for the coast or the entire State.

CONCLUSION

We began this Chapter with a consideration of recreation, broadly defined. For Maine, recreation means money; it also has a bearing on the quality of life in Maine.

As has been pointed out elsewhere,[82] the recreational and aesthetic values are frequently not bidders in the competition for water and land; the market economy does not work to preserve these resources for recreation, and water and land may go to (or be destroyed by) other uses -- the industry which pollutes or is an eyesore, the city which dumps its raw sewerage into a stream, the housing development built on land with poor drainage -- which does not pay the cost of the resource it thus uses.

It is therefore particularly important, in considering recreation and aesthetics, that an outside force impose the ordering and allocation of values which, in most other matters, are ordered and allocated by the economics of the market.

Maine has now taken the first steps toward this sort of ordering of her values. But until comprehensive plans can be systematically enforced, we may expect the continued loss of the qualities which have made the Maine Coast, and life along it, so highly respected.

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82. See e.g., J. McKee, As Maine Goes, fn. 25 supra.

APPENDIX A

A breakdown of Department of Interior Funding in Maine for Year Ending June 30, 1968 (Rounded to Thousands).

County	Outdoor Recreation Funding	Total Agency Funding
Androscoggin	$ ----	$ 14,000
Aroostook	5,000	33,000
Cumberland	158,000	234,000
Franklin	6,000	28,000
Hancock	10,000	964,000
Kennebec	61,000	3,206,000
Knox	---	36,000
Lincoln	34,000	666,000
Oxford	48,000	63,000
Penobscot	5,000	457,000
Piscataquis	3,000	41,000
Sagadahoc	158,000	188,000
Somerset	---	7,000
Waldo	55,000	74,000
Washington	49,000	210,000
York	148,000	270,000
Total	$740,000	$6,491,000

Some State Functional Federal Funds of Departments of Interior type (if not in entirety from the Department) for the year ending June 30, 1968:

Land and Water Resources	$3,374,000
Forest Resources	739,000
Fish and Wildlife Resources	1,993,000
Recreational Resources	1,516,000

Overall Federal Fund receipt indicates that Maine is rated as:
37th in Population
38th in Number of Poor
44th in Total Federal Funds Received
47th in Total Department of Interior Funds received.

[All of the above information was extracted from Federal Information Exchange System, in Federal Outlays in Maine, Clearinghouse for Federal, Scientific and Technical Information, National Bureau of Standards, Springfield, Va. 22151.]

Comment: The State has received considerable moneys from this one Federal agency but certainly has not been totally overblessed when compared nationally which in addition also appears to be the case vis-a-vis Maine's total receipt of Federal funds for all purposes compared nationally.

APPENDIX B

Maine State Planning Office

Work Program

Maine Coastal Development Plan

(November, 1969)

I. Need

This proposal is presented as a top-priority project for the State Planning Office as part of its statewide planning responsibility. There is an obvious and urgent need for such a plan to assure sound and orderly development as a means to conserve one of Maine's greatest assets, its coastal resources. Moreover, public concern and interest over the protection of these coastal resources has increased rapidly during the past year. At present, it would be very difficult to conceive of a more timely or important planning project in such a vital development area for the State of Maine.

As a demonstration planning project, its findings and recommendations would serve the entire nation as well as Maine. Coastal areas on our seacoast promise to be the scene of great and immediate development activity throughout the nation. These areas will be subject to increasing demands because of the present and future concentration of population and economic activity on long stretches of our seacoast.

This state is now experiencing unprecedented demands for use of its coastal resources. Commercial developers, land speculators, industrial concerns, conservationists and recreationists along with many other interests are in competition for the use of Maine's coastal areas. The need, therefore, for a Coastal Development Plan to guide the use of our coastal resources is immediate and well-established.

II. Purpose

The ultimate task and purpose of the project will be the preparation of a comprehensive development plan for the coastal area of Maine. Although there is some variation in the context of comprehensive plans, this plan will place special emphasis on a land classification system with development standards to be applied to specific areas. This classification system will be designed to permit adoption and enforcement of land-use controls by appropriate local, state and federal levels of government to guide sound development practices by both private enterprise and public agencies. Necessary state legislation and local ordinances will be recommended, along with financing proposals and administrative arrangements. Background information on transportation, population, community plans and individual state goals would be included in the plan documents.

Special attention will be given to water use along with the traditional concern of planners with land use. An attempt should be made to relate proper land use to increasing

water use and deal with the problems involved in the regulation of offshore activities. Among other subjects, this task would include defining regulations needed to control mineral exploitation such as gas and oil deposits, establish an adequate information base and scientific approach for conservation laws, deal with the problems arising from marine recreation, consider navigational limitations and port development, and finally, consider in detail the overall pollution problem in relation to recreational, commercial and industrial development. The object of this aspect of the study will be to make compatible through planning and regulation many of the present incompatible uses of water and land along our coastal areas.

III. Regional Development Strategy

The Maine coast will also serve as a pilot program for development of a cooperative State-Federal coastal zone plan and action program. The State will prepare a plan for coastal development and management considering State, regional and national needs and objectives as the first phase of the effort. Following preparation of the State development plan, the second phase of the program will be initiated with Federal and State agencies preparing action plans for carrying out public sector responsibilities.

The New England River Basins will provide coordinated regional and national inputs to the study developed with Federal and State agencies, and will work with the State of Maine in shaping the plan. In addition, the Commission will hold a conference focusing on the New England coastal zone and its problems. The Commission will publish a report resulting from the conference and including a framework for additional action in the coastal zone. The report might be titled "Outlook for the New England Coast."

IV. Tentative Time Schedule

A. Phase I (11/69 to 3/70)

This time period will be devoted to determining who should participate, the nature and scope of their contribution, how various capabilities and inputs may be integrated for optimal results, and the preparation of a detailed schedule of events. This time period would also be directed toward establishing study procedures and methodology. This would include the following tasks:

An inter-agency Coastal Planning Advisory Task Force of State agencies will be formed as a working unit to assist in the preparation of the plan.

Preliminary goals and objectives will be established so that those participating organizations may be better coordinated and related in their day-to-day activities.

An inventory and analysis of existing studies, public and private, related to the plan with special emphasis on State, regional and local planning groups, will be conducted.

Procedures and coordinating activities and techniques will be established. A critical path schedule will be prepared to illustrate the sequential relationships of major activities relating to preparation of the plan.

Determine the capabilities of each participating State, Federal, regional, local and private agency in their contribution to the formulation of the plan.

Liaison and working relationships with regional, State, Federal agencies, and private groups will be established.

B. Phase II (3/70 to 12/70)

The year will be devoted to gathering and compiling basic data and to develop procedures for establishing an initial inventory and classification system. An examination and evaluation of inter-agency and public-private coordination would be conducted with an objective of creating an effective planning partnership and coordinating machinery to establish regulation and controls for water and land use in the coastal zone. This will include the following activities:

Define the coastal zone to be studied.

Develop the procedures and content of a coastal resource and land-use inventory and classification system.

Prepare a basic inventory of the natural and land-use characteristics of the Maine Coast. (Mapping)

Compile data concerning the physical type use and ownership use of natural resources.

Determine coastal land and water use trends.

Classify coastal resources based upon their natural characteristics, ecological relationship and land-use features.

Publish an interim plan.

C. Phase III (1/71 to 12/71)

Conduct public hearings and utilize other means of eliciting the views of interested parties on the interim plan.

Revise the interim plan on the basis of public reaction and additional information.

Identify major land-use conflicts and indicate priorities for immediate action.

Evaluate the environmental impact of existing and anticipated demands for the use of coastal resources.

Propose action relative to priority needs and future trends.

Propose regulations and controls to insure that coastal resources will be used consistent with their natural character and ecological relationships.

A final comprehensive coastal development plan will be published late in 1971.

D. Phase IV (1/72 to 12/72)

Propose institution arrangements for implementation and enforcement action.

Propose State legislation and local ordinances necessary to implement the coastal development plan.

Conduct detailed planning on immediate action programs with the necessary authorities.

Prepare a detailed State-Federal-Regional Program for coordinated action throughout the New England Region.

APPENDIX C

Legislative Document No. 908 - February 19, 1969

AN ACT to Provide Certain State Level Land Use Controls

. . . .

CHAPTER 424

MANDATORY ZONING AND SUBDIVISION CONTROL

§ 4711. [sic] Shoreland areas

To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety and the general welfare, it is declared to be in the public interest that shoreland areas defined as those land areas any part of which are within 500 feet of the normal high water mark of any navigable pond, lake, river, stream or salt water body be subjected to zoning and subdivision controls. The purposes of such controls shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish, aquatic life, bird and other wildlife habitat; control building sites, placement of structures, and land uses; and conserve shore cover, visual as well as actual points of access to inland and coastal waters and natural beauty.

§ 4812. Municipal control

Municipal units of government pursuant to presently existing enabling legislation are authorized to plan, zone and control the subdivision of land. With respect to the shoreland areas defined in section 4811 municipalities shall be given until June 30, 1971 to adopt zoning and subdivision control ordinances.

§ 4813. Municipal failure to accomplish purposes

If any municipality fails to adopt zoning and subdivision control ordinances for shoreland areas as defined in section 4811 by June 30, 1971 or if the Water and Air Environmental Improvement Commission determines that particular municipal ordinances because of their laxity and permissiveness fail to accomplish the purposes outlines in section 4811, the Water and Air Environmental Improvement Commission shall, with respect to these shoreland areas, adopt suitable ordinances for these municipalities which ordinances the respective municipalities shall then administer and enforce under state direction.

§ 4815. Cooperation

The Water and Air Environmental Improvement Commission, municipalities and all state agencies shall mutually cooperate to accomplish the objectives of this chapter. To that end, the commission shall consult with the governing bodies of municipalities and to whatever extent necessary with other state agencies to secure voluntary uniformity of regulations, so far as practicable, and shall extend all possible assistance therefor.

CHAPTER SEVEN LAND USE CONTROL PRINCIPLES APPLIED TO OFFSHORE COASTAL WATERS *

The preceding chapter, although oriented toward the preservation of the recreational potential of the Maine Coast, amounted to a review of the statutory devices available for regulating land use generally--whether for preservation of recreation, or for other goals. Despite the discouraging conclusions that there is no significant regulation of land use and development along roughly two-thirds of the Maine coast, the tools for such regulation are at least available whenever there is sufficient will to put them into use.

Below low tide line, however, this situation changes and there is generally a lack of statutory provisions for regulating water area uses. This is not to say that the use of water areas--the surface, water column, bottom, and substrata--is wholly unregulated; as we have noted throughout this study, specific activities taking place in the ocean environment are regulated, perhaps even overregulated, by such means as lobster fishing licenses,[1] fishing gear restrictions,[2] boating safety zones,[3] harbor master regulations,[4] limitations on extractive industries,[5] and now taxes and

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1. 12 M.R.S.A. 4404.

2. See Vol. IV, Chapter on Fisheries.

3. 38 M.R.S.A. 201(16) and 38 M.R.S.A. 237(4).

4. 38 M.R.S.A. 1-6.

5. 10 M.R.S.A. 2102, 2109 as amended by P.L. 1969, c.508; 10 M.R.S.A. 2151-2166 as added by P.L. 1969, c.301. See Vol. IV.

civil liability in connection with coastal conveyance of petroleum products.[6] But each of these and the myriad of other restrictions on ocean activities is essentially ad hoc, treating the activity in question largely as an isolated phenomenon. Each treats the coastal waters of the State as an undifferentiated whole; for the most part the regulations apply uniformly across the State's waters.

Below the low tide line, there is no means for systematically planning and deciding which among the possible competing uses should be preferred, yet actual and would be users of the coastal lands and waters have demonstrated a capacity for getting in each others way. Absent governmental intervention, the obvious winner in such competition must inevitably be the largest economic interest.[7] As long as the demand for coastal and water areas was limited and the supply seemed infinite, allocation of their use to short-run economic interests could pass unnoted or be accepted. But as we see demand burgeoning and supply recognized as finite, a more rational and far-seeing approach must be utilized. This chapter will seek to develop (more precisely, to borrow) a conceptual approach whereby coastal water areas may be preserved and protected in the long-run, and competing uses of the water area may be harmonized in the short-run, on some basis other than economic muscle.

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6. 38 M.R.S.A. 541-557 as added by P.L. 1969, c.572.

7. Note, Legislative Discouragement of Maine's Marine Industrial Growth, 22 Maine L. Rev. 265, 278 and n.48 (1970).

The borrowed principles will be many of those common in land use control,[8] e.g., zoning, building and safety codes, licensing; but the same problem which impairs their effectiveness with respect to land, the lack of political will to adopt and implement such control techniques, must be overcome if Maine's offshore water areas are to continue to serve and be available to the numerous and diverse interests seeking to use them.

Offshore Water Areas Divided

It is possible to divide coastal water areas vertically into five categories, each giving rise to separate and in many ways quite distinct use opportunities, and each capable of being subjected to separate (though necessarily related) regulatory schemes.[9] Some water-related activities, though focused principally on (or in) one of these five water area categories, will of necessity touch or concern two or even all five of these water area divisions. Control mechanisms if they are to be successful in such situations must demonstrate a certain imaginativeness and flexibility.

Though the divisions are at least partly arbitrary, a vertical labeling[10] of the total water area is convenient to focus attention on some

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8. See O. Delogu and D. Gregory, Powers and Devices for Controlling Land Use (Univ. of Maine, Agricultural Experiment Station, Planning and Law in Maine, Part 2, 1967).

9. This approach is not new. Common law and modern water law doctrines speak in terms of rights to use water as distinguished from rights in the bed of a lake or stream. See, e.g., Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919).

10. Something akin to this vertical dichotomy of a water area is embodied in Florida's recently enacted Submerged Lands Act, Fla. Stat. Ann. §253.67(2) (Supp. 1970) discussed supra, Vol. II, p.346; See Vol. IV, Chapter on Fisheries; See also Alaska Stat. §38.05.082(e) (1968).

very real differences in competing water related activities, and may aid in developing regulatory approaches. The five categories are:

1. Inter-tidal zone (beach, shore, strand). See Vol. II, p.195.
2. Surface water areas.
3. Areas between the surface and the bed (the "water column").
4. Bed areas.
5. Areas below the bed (substrata).

Bathing, clam and bloodworm digging are activities limited to the inter-tidal zone. Commercial navigation, sailing, water skiing, and swimming are activities limited almost exclusively to the surface or the surface plus a shallow area in depth below the surface. Scuba diving, sport and commercial fishing, seaweed harvesting though often undertaken in connection with a surface vessel essentially focus on materials located between the surface and the bed. Shrimping, the trapping of lobster, and dredging for sand and gravel, though again often connected with surface vessels and using equipment which may more or less permanently intrude into the water column, are principally bed oriented undertakings. Examples of sub-bed activities include oil and gas exploration and drilling.

A regulatory scheme which seeks to maximize the number of competing water related activities in any one water area, and at the same time minimize the harmful conflicts which occur, must focus on the specific water area needs which given activities require.[11] Without going into great

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11. The report of the Commission on Marine Science, Engineering and Resources, Our Nation and the Sea, A Plan for National Action (1969) recognized these points on pages 52-58 when it describes the proliferation of and the need to accommodate a widening range of coastal water users. The Commission recommends that state coastal zone authorities (Cont'd)

detail on this point, it is obvious that where sand and gravel dredging, for example, is permitted, shellfish harvesting will be almost impossible. Inadequate regulation of the bed areas wherein dredging will be permitted will expose the shellfish interests to genuine risks; fear of such risks may lead them to totally oppose dredging activities. The absence of effective regulation protecting all users virtually forces competing incompatible water using activities to try to have their opposite numbers legislated out of existence. So we have oil exploration interests vieing with fishing and lobstering interests; the seaweed gathering industry at odds with the fishing industry; commercial shippers and trans-shippers in conflict with conservationists and recreational boat interests. Each of the opposed interests views the entire coastal water area as open to them, and seeks to preserve it for their use as a matter of right.[12] In this competition the dominant interest (in an economic or political sense) usually prevails in the Legislature. However, if these incompatible interests could be made to view offshore water areas in terms of an allocation of area -- an allocation with both vertical and horizontal dimensions,

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11. (Cont'd) be created to manage and give policy direction to these critical water areas and their adjacent land areas. "The guiding principles for the authorities should include the concept of fostering the widest possible variety of beneficial uses so as to maximize net social return. When necessary, public hearings should be held to allow all interested parties to express views before actions are taken or decisions are made..." Id. at p.57-58.

12. A partial explanation for this view may be found in the Common Law doctrine that held all riparians to the status of co-sharers. Originally the sea and subsequently navigable inland waters were thought to be incapable of exclusive ownership, thus a system of use rights in the undivided whole emerged.

the element of conflict could be largely removed.[13]

Many water using activities, because of their nature and because they take place almost exclusively in only one of the water areas described, are compatible with and pose no threat to one another. Most surface activities, for example, will be largely unaffected by most sub-surface activities. Thus, though it may be necessary to allocate specific and different surface water areas to competing surface users (such as commercial navigators, recreational sailors, water skiers, and swimmers), subsurface activities such as seaweed harvesting, fishing (including shellfish gathering), even mineral exploration may take place below almost any surface water area without impairing the designated surface activity.[14]

Instead of or in conjunction with a vertical differentiation, coastal water areas may be divided horizontally[15] -- the sort of division most

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13. See, e.g., Fla. Stat. Ann. §253.68 (Supp. 1970). "To the extent that it is not contrary to the public interest, and subject to limitations contained in this act, the trustees may lease submerged lands to which they have title for the conduct of aquaculture activities and grant exclusive use of the bottom and the water column to the extent required by such activities." (emphasis added); Alaska Stat. §38.05 (1967) contemplates a wide range of exclusive leasing arrangements for the carrying out of what would otherwise be competing development activities. The legislation covers land and coastal waters and is clearly premised on the concept of allocating areas in order to maximize both public and private advantage. No similarly broad based approach is found in Maine's statutes.

14. However, according to Dorian Cowan, Research Associate, Univ. of Miami Law School (commenting Dec. 69) Florida's experience of exclusively leasing a bed area for a particular type of aquaculture but at the same time allowing boating, bathing, and other theoretically compatible activities to continue on the surface or in close proximity to the exclusively leased area has produced some troublesome results. Though seemingly compatible they often get in each others way and the leasee for value is displeased when his commercial activities are damaged or hampered. Greater exclusivity seems called for. See Vol. IV,

closely analagous to land use zones and alluded to in the previous paragraph as a means of separating water skiers from swimmers and the two of them from commercial navigation or sailboating. A horizontal division of offshore water areas may take a concentric ring approach which allocates immediately offshore water space to those activities which of necessity or for safety reasons must be performed in close proximity to shore, e.g. swimming,clam digging, etc. (It may be necessary even as between these water users to allocate specific areas.). Further offshore water areas could be allocated to lobstermen, sailboating, etc., leaving more distant offshore areas to commercial fishing, seaweed cutting, oil and gas exploration, etc. Shipping channels[16] would be designated whether or not the allocations were made for other purposes. Unique water areas though lying in a larger zone earmarked for a given purpose may be devoted to the unique activity. For example in a large area close to shore reserved for swimming

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15. A somewhat similar approach is taken in Our Nation and the Sea, A Plan for National Action 49-51 (1969) and 1 Panel Reports of the Commission on Marine Science, Engineering and Resources, Science and Environment, p. III, 7-10 (1969). Both speak of dividing the coastal zone in a horizontal manner extending from shoreland to internal waters, territorial sea, contiguous zone waters and then out to the remainder of the continental shelf. [Ed. This is the horizontal division traditional in international law.].

16. See Wilkes, Consideration of Anticipatory Uses in Decisions on Coastal Development, 6 San Diego L. Rev. 354, 368 (1969); Our Nation and the Sea, (1969). "The great size of merchant vessels, their transport of cargoes which create a hazard to the environment, and the intensified use of the coastal zone combine to present an increasing danger. Proposals have been advanced for traffic control systems analogous to those used in the U.S. airways. In addition, plans are being developed to set aside shipping lanes which will separate inbound and outbound traffic and provide a fairway clear of obstructions to navigation." Id. at p.215.
Present Maine law provides that watercraft may not be operated within 200 feet of the shoreline. (38 M.R.S.A. 237(4)).

and shellfish gathering etc., a small area which has rich sand and gravel deposits may well be set aside for that purpose rather than the generally permitted uses.[17] In such a case the charge of spot zoning within a water area ought not to be capable of being raised.

The Tools of Control Applied to Offshore Water Areas

Implementation of water area use allocations could be achieved by Federal, State or local level governmental action (assuming adequate enabling legislation in the latter case); each has a significant role to play in preserving our offshore water resources and in allocating water use rights between competing interests. But too local an approach is neither feasible or desirable.[18] Offshore waters must be thought of and regulated as a connected whole. Geography, ecology, economics, all demand

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17. The regulating authority will have to develop a stringent set of criteria and safeguarding conditions which must be met before such changes (analogous to special exceptions or variances in zoning law) would be permissible. See Delogu, Suggested Revisions in Maine's Planning and Land Use Control Enabling Legislation, 20 Maine L. Rev. 182, 202-03 (1968); 30 M.R.S.A. 4954(a)(A).

18. See Our Nation and the Sea, (1969):

> Federal, state, and local governments share the responsibility to develop for the coastal zone a plan which reconciles or, if necessary, chooses among competing interests and protects long-term values....
>
> . . . .
>
> After reviewing the various alternatives...the Commission finds that the states must be the focus for responsibility and action in the coastal zone....
>
> In varying degrees, the states possess the resources, administrative machinery, enforcement powers, and constitutional authority on which to build. However, they will need Federal assistance and support, and the Federal government must assure the protection of national interests in the coastal zone.

Id. at p.56-57; See also 1 Panel Reports of the Commission on Marine Science, Engineering and Resources, Science and Environment, p.III 148-57 (1969).

that this be so.[19] If the State itself does not impose the controls suggested, at the very least it must coordinate whatever local controls it enables to be imposed. No local unit of government ought to be in the position of being able to totally exclude a given water using activity because of local biases. Concepts of exclusion and exclusivity which undermine the credibility and acceptance of zoning and other land use controls must be avoided.[20] Furthermore local units of government do not have the scope of jurisdiction nor the planning and evaluative resources to adequately or accurately allocate offshore water areas between competing would-be users.

Finally, gaps in the control program are not tolerable. It would not do to have a portion of Maine's coastal waters subject to meaningful controls while other water areas remain uncontrolled. This phenomenon very much in evidence with respect to land use controls is increasingly

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19. If a state approach seems too remote or centralized and local units seem too limited in funds, jurisdiction, etc. to cope with comprehensive coastal planning and regulation, a regional or special district approach may be suitable.

A State's options range from creating a statewide agency to creating a local authority for a particular region. The latter appears to have certain advantages:

-- It may more readily fit in with existing local authorities;
-- It would be more responsive to the particular problems of a region;
-- It would permit a state to establish regional authorities on a step-by-step basis according to needs.

Another option in setting up a state coastal management authority is the creation of a special district along the lines of a metropolitan sanitation district or port authority. Such a district could be established easily by state legislatures. The district would cause minimum disturbance to existing units of government. Its concern would not be diluted by that for other regional problems.
Id. at p.150.

being recognized as an impediment to effective long-run land use control programs.[21] In addition to the reasons mentioned in the preceding chapter, communities may refrain from imposing controls in the hope of gaining some short-run economic advantage over communities which have done so. The controlled community may then have second thoughts about the wisdom of the restraints it imposed on its residents and may either repeal or, worse yet, fail to enforce or otherwise erode away the effects of its ordinance. We do nothing to protect our offshore water resources by allowing this sequence of events to be repeated in this context. Either the State itself must impose the controls or it must require not merely permit,[22] local governments to act.

SPECIFIC CONTROL DEVICES

Zoning:

Ideally zoning, an exercise of the State's police power, divides an area (traditionally a land area) in a manner which incorporates the widest possible range of use alternatives in appropriate districts. Nothing

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20. See Grondin v. Inhabitants of Eliot, Civil No. 975-A, Super. Ct. Me. April 30, 1969; O. Delogu and D. Gregory, Powers and Devices for Controlling Land Use 18-20 and n.55 (Univ. of Maine, Agricultural Experiment Station, Planning and Law in Maine, Part 2, 1967).

21. See the preceding chapter for details of the incomplete coverage of present Maine planning, zoning, and other land use controls.

22. This approach has been taken by Wisconsin in its shorelands protection legislation, Wis. Stat. Ann. §59.971 (Supp. 1967); Wis. Stat. Ann. §144.26 (Supp. 1967); See Delogu, Beyond Enabling Legislation, 20 Maine L. Rev. 7-8 (1968).

prevents the application of this same technique from being applied to a water area.[23] A slight adaptation making the water zoning three dimensional would enable the mechanism to incorporate the vertical divisions of the total water area previously set out.[24] Clearly, whether implemented at State or local levels of government, all of the procedural safeguards (hearings, board of appeals, etc.) and administrative flexibilities (special exceptions, variances, etc.) developed with respect to zoning as used in land use control situations could be adapted to zoned water areas.[25] In fact with adequate State control, perhaps in the form of control or variance or appeals machinery,[26] a more uniform and equitable (and thus a more credible and widely accepted) implementation of water area zoning could be achieved than presently exists in Maine with respect to land use zoning.

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23. This certainly is one of the major theses of Wilkes, supra note 16 at 365-69. He poses the possibility of zoning water areas at local, state, regional (inter-state), or federal governmental levels and he poses the possibility of private zoning via restrictive covenant.

24. Even this aspect of the proposed use of zoning is not unique. Some urban zoning ordinances permit the ground floor of buildings in high rise residential zones to be zoned for commercial purposes, thus recognizing a useful vertical differentiation.

25. Zoning of water areas, however, will require the collection of and must be predicated on data not now readily available, e.g., water depth, temperature, tide and current action, slope and contour of offshore bed areas, quality of bed soils, quality of water, extent of present and anticipated use of the water area, etc. In other words a water area profile analogous to a land use plan (or profile) which underlies traditional zoning must be developed as a basis for sound water area zoning.

26. American Society of Planning Officials, New Directions in Connecticut Planning Legislation 113-15 (1967 (report offers fourteen substantive recommendations to streamline and obtain uniform procedural fairness and appeals machinery).

Just as the sensible zoning of land areas must be preceded by an intelligent planning process and an evaluation of the goals and directions in which the community is moving, so too zoning of coastal offshore water areas must be predicated on sound planning and solid empirical data. The arbitrary earmarking of water areas in a manner that permits some uses here and there and excludes other uses is not enforceable zoning even though legislatively adopted. The lines drawn, and more important the uses permitted or excluded in given water areas, must bear a reasonable relationship to such things as the biology and ecology of the area, its configuration, the water depth, tide action, water temperature, existing uses being carried on in the water area, and existing uses being made of the adjoining land area. Water zoning based on accurate data regarding some or all of the above factors (or other relevant factors not listed) will almost certainly be sustained even though it may be very restrictive.[27] It is not often that the degree of restriction serves to invalidate a

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27. The landmark case Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) sustained zoning restrictions which reduced the value of land from $10,000 per acre to $2,500 per acre. Yet the court was unmoved by this degree of economic loss. It felt the remaining value represented a reasonable return to the landowner and stringent controls may frequently be necessary to protect the public interest. See also Boston and Maine R.R. v. County Comm'rs, 79 Me. 386, 10 A. 113 (1887).

> This power of the legislature to impose uncompensated duties and even burdens, upon individuals and corporation for the general safety, is fundamental. It is the "police power;" Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state can not free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state. This important power must be extensive enough to protect the most retiring citzen in the most obscure walks, and to control the greatest (Cont'd)

zoning or other control ordinance. More frequently when regulatory controls are invalidated it is because of failure to show the need for the restriction and its reasonableness in light of real empirically, verifiable, factors or dangers.[28] Clearly, if the threat is great, severe restrictions may be imposed and judicially sustained.

State level planning, relying on data of the United States Coast and Geodetic Survey, the marine research activities of Universities and private institutions situated within the State, and the research findings of existing State agencies, can and should be undertaken to provide the necessary basis for zoning Maine coastal offshore water areas.[29] Local governments do not seem equal to the task and there seems to be no reason why Maine should encourage or wait for federal action of this sort. Should Maine fail to respond along the lines suggested the Federal government may not only undertake an offshore water resources planning function but may well

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27. (Cont'd) and wealthiest corporations. Its exercise must become wider, more varied and frequent, with the progress of society. Id. at p.393, 10 A. at p.114.

28. The requirement after all that an exercise of the police power be in the interest of the public's health, safety, morals, or general welfare is not a mere rubric. Let the regulative body show clearly and unequivocally that the needs of the public in the particular setting justify not only the regulatory control itself but the degree of control contemplated.

29. Many more agencies than the few specifically mentioned in fact have data or research capacities which should be utilized in preparing the zoning controls suggested. A more complete listing of state data and research sources is found in 1 Maine Law Affecting Marine Resources (1969); many federal data and research sources are cited in Our Nation and the Sea, (1969).

enact water zoning controls which the State would have no guarantee would correspond to its wishes.[30]

Leasing:

Either in conjunction with or apart from zoning offshore water and bed areas, the State pursuant to its sovereign power and as trustee[31] (owner if you will) of the State's waters and coastal bed areas below low water mark or over 100 rods from the normal shoreline, may lease at least the seabed, if not the water column, in a manner that is consistent with and protects the public's interest. Such leasing would have the effect of allocating these areas among competing would-be users and insuring to each not only a precise location but a certainty that may well induce extensive capital investment.[32] Such lease arrangements would probably need to be long-term (5 or 10 years) with adequate options to renew and provisions which would allow periodic renegotiation of the lease rental arrangements.[33] Lease arrangements need not be uniform. On the contrary, they

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30. It should not go unnoticed that both the federal Water Quality Act of 1965 and the Air Quality Act of 1967 contain this very (not so veiled) threat--state inaction or meaningless state action will not be tolerated and will in fact give rise to federal action calculated to achieve the desired ends. 33 U.S.C. §466g(C)(2) (Supp. I, 1965) and 42 U.S.C. §1857d(C)(2) (Supp. III, 1965-67).

31. Reference to the state's status as trustee may be found in Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919).
> Whatever doubt might otherwise arise from a critical study of the subject as a matter of legal history, it must now be accepted as the common law doctrine in Maine that the State holds these [great] ponds in trust for the use of the People of the State, together with the right to control and regulate the waters thereof.

Id. at p.503, 106 A. at p.867.

32. A note, Legislative Discouragement of Maine's Marine Industrial Growth, 22 Maine L. Rev. 265 (1970) extensively details Maine's historic and present failure to approach the leasing of offshore bed areas in any rational, systematic, or comprehensive fashion.

can and should be framed with appropriate conditions predicated on the particular use sought to be made of the water or bed area, the unique characteristics of the leased areas, and the legitimate conservation expectations of the state.[34] This fixing of the specific terms of a lease can be accomplished within the more or less well established legal framework of contract and landlord-tenant law. Thus enforcement of limitations imposed by the public will be less difficult, certainly easier for example, than enforcement of general pollution control statutes. Enforcement is facilitated the more clearly the terms of the lease spell out the rights and duties of each party and the remedies available in case of breach.

It is not inconceivable that lease rights within each water or bed use category would be auctioned to the highest bidder as was recently done with oil lands in Alaska.[35] The State would first have to allocate offshore water and bed areas among all of the alternative use possibilities. This would insure that water or bed using activities with little or no economic clout would none the less have a reasonable number of areas

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33. This approach is part of the Florida legislation, supra note 10, Fla. Stat. Ann. §253.71(1)(2) (Supp. 1970).

34. See e.g., Ore. Rev. Stat. §273.051(2)(b), 274,760. 274.780 (1967).

35. Ed. Note that despite the author's disclaimers, the more the state is given a financial return dependent on industry's ability and willingness to pay, the more likely it is that allocation will be based on financial considerations exclusively.

36. The important point to reemphasize is that would-be oil drillers would not be bidding against weed gatherers and the latter would not be bidding against lobstermen, etc. Bidding would take place separately within each category of offshore water or bed use and would allocate water or bed areas suitable for that particular use among whatever number of users (developers, fishermen, etc.) there are. If desired certain preferences to protect existing businesses or resident (Cont'd)

allocated to them. Then within each category of activity individual areas suitable and allocated to that particular activity would be auctioned.[36] For example, if it is determined that there are along the coast of Maine seventeen areas that should be allocated to and that are suitable for seaweed harvesting and more than twenty five firms are interested in these sites, an auction would not only be a fair means of allocation as among the twenty five but would insure maximum revenue return to the State for exploitation of its resources. It goes without saying that restrictions such as the number of leases any one firm may hold or the minimum requirements for submitting a bid, etc., may be established. It would also seem useful to allow the leases to be transferable.[37]

A good deal of emphasis should be placed on the element of certainty that State leasing would give rise to. Seaweed cultivation, oil and gas exploration, aquaculture, and a host of other activities will not be undertaken on a meaningful scale unless and until the entrepreneur can be assured that he alone will be able to reap the benefit of his time, effort, and investment.[38] Leasing can create such an assurance. It can and should

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36. (Cont'd) bidders in each use category could be worked into the bidding process. Limitations or quotas with respect to size, financial capacity, ability to perform, etc. could also be developed; Alaska Stat. §38.05.075 (1968); Tex. Rev. Civ. Stat. Arts. 5331-37, 5353-58 (1962); Wash. Rev. Code §79.01.244 (Supp. 1969), §79.01.252 (1962).

37. See, e.g., Alaska Stat. §38.05.090, §38.05.095 (1968).

38. Our Nation and the Sea (1969).
> Large-scale technological applications simply cannot be undertaken in marine industries if property rights, market access, labor regulation, taxation, and the many other elements of the legal and regulatory environment remain in their present undertain condition.
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> . . . .

(cont'd)

give rise to an exclusive property in a defined portion of total offshore water or bed areas for a time period long enough to allow all capital and operating costs (including a reasonable profit) to be recovered.

Licensing

Another technique, widely used to control land use activities, which seems adaptable to the regulation and control of offshore water and bed areas is licensing. It too may be used in conjunction with or apart from zoning controls and is predicated on the state's police power. Licenses, unlike leases, normally deal uniformly with all who fall within a class or category being subjected to control. Where the State does not have a recognized ownership interest, as it does in the seabed and substrata, licensing may be the best alternative to leasing. Regulation may be achieved by attaching fees, by limiting the number of licenses which will be made available in a particular area for a particular activity, and by specifying certain terms and conditions which all who would operate under the license must comply with.

Limitations on numbers of licensees and significant license fees may render the license as effective as a lease, for most purposes. Geographic restrictions are possible -- compare federal licensing of radio and TV stations.

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38. (Cont'd)
The Commission recommends that a framework of policies and laws be established that will allow predictability and therefore, increased confidence and investment activity by industry.
Id. at p.160.

Compliance with the terms or conditions of a license may be made more certain by provisions requiring that suitable (from the standpoint of amount) bonds be posted in the nature of performance or penalty bonds.

Building and Safety Codes:

The use of offshore water and bed areas may not often entail the use of structures (buildings) of quite the same type as exist on land and which on land are usually subject to building and safety codes. However, houseboats, more or less permanent floating facilities, derricks, drilling platforms, anchored vessels, fishing shacks, and a variety of other structures or craft do exist in varying degrees of newness, dilapidation, safe condition, etc.. This assortment of structures does house persons and property, does contribute to situations involving health and welfare (human as well as plant and animal) and the structures do serve as bases of operation for a wide variety of industrial and commercial processes as well as private recreational activities.[39]

It seems perfectly consistent, then, to frame suitable codes in line with existing Coast Guard limitations to be applied to each of these types of structures and undertakings to protect not only the public's interest

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39. The Bureau of Watercraft Registration and Safety, see 38 M.R.S.A. 201 - 285 (Supp.) is an existing state agency which appears to have sufficient regulatory power to undertake the controls suggested. To date its activities have almost totally been limited to boat registration and minimal boat safety requirements. The Bureau's enabling legislation could easily be clarified to specifically include the widening range of structures being located on or in offshore water areas for which safety and building code type requirements are necessary.

but the health, safety, and welfare of those individuals working, living, or recreating in these contexts. To some extent such codes (clearly analogous to building and safety codes) predicated on the state's police power already exist, but they are few in number, e.g., boat safety regulations, beach safety regulations, etc.[40] I suggest extending these few examples to cover every type of offshore water and bed activity. We simply have not put our mind to such an undertaking being of the view either that the sea was not capable of being damaged or that the number of persons involved did not warrant this sort of regulatory attention.[41] Today, however, we know the ecology particularly of sensitive estuarine areas is very susceptible to permanent injury. We know that huge water bodies, i.e., Lake Erie, can be permanently damaged.[42] And we are faced with a tremendous increase in the number of structures and persons in need of and demanding this sort of protection. The discharge of pollutant materials from boats in overcrowded harbors or marine areas, the dumping of garbage through the ice in fishing shacks, the potential harm of uncontrolled water skiing in close proximity to beach or bathing areas, the inadequacy of fire protection and other safety equipment and communications equipment which is common most offshore structures or vessels --

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40. 38 M.R.S.A. 238 (Supp.): 38 M.R.S.A. 281-83. Coast Guard has regulations on structures in navigable waters.

41. Many of these points are alluded to in Our Nation and the Sea, p.214-216 (1969) ("The Commission recommends that the National Oceanic and Atmospheric Agency [Coast Guard] undertake to reexamine and update existing laws relating to vessel safety standards....").

42. Cf. Reitze, Wastes, Water, and Wishful Thinking: The Battle of Lake Erie, 20 Case W. Res. L. Rev. 5 (1968).

these are all real conditions which can and should be remedied.

Easement:

When regulatory controls alone are insufficient to achieve a desired public end with respect to a given privately owned offshore water area (or combination of land and water areas) the public rather than acquiring the property involved in fee may desire to acquire a lesser interest. Acquisition of a carefully designed easement interest can not only fulfill the public's objective but can do so at less cost than fee simple acquisition. In addition maintenance costs of an easement are usually less than the costs of maintaining the fee and because the major portion of the total property interest remains in private hands, the local property tax base is less affected than it would be by public acquisition of the fee.[43]

Without getting into a lengthy discussion of the varieties or the mechanics of easements suffice it to say that they may be designed to allow the public to undertake to do an act which it would otherwise not have the power to uo, e.g., remove earth fill or rock outcroppings on private land so that a scenic marsh, cove, or estuary may be better viewed by autos traveling a coast road, pass over private land to obtain access to a beach or water area, dredge a private bed area for recreational or commercial navigation purposes, etc. Alternatively easements may prohibit a private owner from doing an act which he would otherwise have the power to do, e.g., fill or dredge coastal marsh or tide lands possibly harming fish and wildlife, cut timber or other cover to the detriment of scenic

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43. O. Delogu and D. Gregory, supra, note 8, at p.12-14 and n.35-39.

coastal areas, build or otherwise develop on, in, under, or near coastal waters at a time or in a manner inimical to the public's interest.[44]

In short, when regulatory control cannot achieve public goals, easement offers a compromise -- a middle ground between complete public or private ownership control. The private landowner retains a meaningful range of alternative use possibilities (and he has been compensated for those which have been taken), and the public acquires rights in the same property which allow a desired public purpose to be achieved.

Other Control Mechanisms:

Though not typically thought of as land (or water) use control mechanisms, a number of other governmental powers exist which can and should be utilized to achieve desired ends with respect to coastal land and water areas. Though not the the principal focus of this paper, they will be briefly alluded to.

The power to tax could be wielded much more effectively than at present to influence alternative land and water use possibilities[45] in a positive manner. This power includes, of course, the power to defer tax

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44. The ability of municipal governments to negotiate for and enforce the provisions of conservation easements was significantly strengthened by 33 M.R.S.A. 667-8 as enacted by P.L. 1969, c.566 at the Special Session of the 104th Legislature.

45. Delogu, The Taxing Power As A Land Use Control Device, 45 Denver Law Jour. 279 (1968); The 104th Legislature passed a constitutional amendment (Resolves, 1969, c.34; P.L. 1969,c.246) (which goes to referendum November 1970) allowing differential property taxation for the express purpose of fostering and preserving land and water use activities which would otherwise be forced out of existence if uniformly taxed solely on the basis of market oriented (and often theoretical) concepts of highest and best use; cf. Me. Pub. Law 1969 ch.246.

collection, exempt certain categories of land and water or income from taxation, establish the rates of taxation, and redistribute taxes in whatever manner seems appropriate.

Governments (state and local) have the power to increase their proprietary holdings in coastal lands and waters. Obviously this places more areas under public ownership control. More important however, is the impact these publicly owned areas have on adjacent private holdings and private development decisions. Picture if you will the effect in terms of stabilizing or upgrading property values, preservation, demonstration, etc. that would follow if present public land and water holdings along the coast were increased ten-fold, one hundred-fold.[46]

Finally the mere formulation and articulation of governmental (federal, state or local) policy and goals by persuasive executive, legislative, and administrative leaders will have a shaping effect not only on governmental but on private land and water use decisions. Note the dramatic impetus given to all programs dealing with beautification and

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46. See Our Nation and the Sea, (1969);
"The additional land acquisition programs proposed by the Commission are estimated to require some $110 million of Federal funds over the next 10 years. The estimates are geared to acquisition of 1 million acres of wetlands, about 15 percent of the nation's total, plus selected urban waterfront areas suitable for recreational use.
Id. at p.80.
The Maine State Park and Recreation Commission
12 M.R.S.A. §601-80 (Supp.) was authorized by the 103rd Legislature to increase the state's holdings of lands and waters to serve as park areas, Maine Private and Special Laws, 1967, c.167; (a $4 million dollar bond issue was subsequently approved in a referendum held november 1968 to finance this undertaking).

conservation once the issue of the "quality of our environment" was raised by the President of the United States.[47]

COORDINATING WATER AREA CONTROLS WITH LAND USE CONTROLS

The most well conceived controls of structures and activities in offshore water areas will not be effective unless and until abutting land areas are brought under a similar system of study, planning, and control as is here suggested for offshore waters. Inconsistent patterns of activity between coastal land areas and immediately offshore waters are extremely common,[48] e.g. the discharging of industrial, commercial, or residential effluent in a manner that destroys clam flats, bathing areas, etc., poor location of unsightly industrial structures, wharves, dumps, etc. with respect to an otherwise scenic coastal area, the blocking off by private land ownership of access to coastal waters allocated to and ideally suited for a variety of water activities. The list could be extended but the point is already clear -- water use and abutting land use are intimately related. The biologist and ecologist would certainly see these seemingly separate areas as a single interdependent life support system. The

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47. In Maine the Report of the Governor's Committee on Pollution Abatement, Pollution in Maine: Suggestions For More Effective Environmental Preservation (1969) followed by Governor Curtis' Special Message on Conservation and Economic Development (1969) had much the same effect. A majority of the recommendations embodied in these two documents were subsequently enacted into law by the 104th Legislature.

48. Mandatory planning and land use controls in shoreland areas have to date been rejected in Maine. See, e.g., Wis. Stat. Ann. §59.971 (Supp. 1969); Wis. Stat. Ann. §144.26 (Supp. 1969). The special session of the 104th Legislature did, however, enact legislation regulating on a statewide basis the location of large developments, P.L. 1969, c.571.

dredging or filling of marsh areas,[49] the indiscriminate cutting of shore cover, the altering of stream flows (either in terms of location, quality, volume, or temperature) cannot fail to have profound and permanent effects on estuarine and more distant offshore water areas.[50] Conversely the location of shipping lanes, the location within coastal water areas of dredging, drilling, or weed cutting operations, the location of seafood processing establishments may all have tremendously harmful and equally permanent effects on land values and the quality of living along the coast.

The point to be emphasized is that coordinating water use controls with land use controls is not intended to and will not likely result in curtailing or shrinking the range of entrepreneurial activities that can take place in either water or land areas. If anything the number of potentially competing activities will be increased by having had specific, well-suited land and water areas allocated to them. Financial success is made more certain by a more harmonious blending of activities with one another and with the particular characteristics of a local environment.

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49. Our Nation and the Sea, p.49-81 (1969);
"Seventh percent of the present U.S. commercial fishing effort takes place in coastal waters. Coastal and estuarine waters and marshlands provide the nutrients, nursing areas, or spawning grounds for two-thirds of the world's entire fisheries harvest. Seven of the ten most valuable species in American commercial fisheries spend all or important periods of their lives in estuarine waters, and at least 80 other commercially important species are dependent upon estuarine areas.
...But the estuaries are in danger. Pollution is an ever increasing threat. Land fillings, dredging, dumping, and marsh draining reduce their areas.
...In the past 20 years, dredging and filling have destroyed seven percent (more than a half million acres) of the nation's important fish and wildlife estuarian habitats.
Id. at p.53-54.

Certainly the damaging consequences of unplanned growth and exploitation of coastal resources can be avoided.

The scope of the problem can perhaps best be grasped if regarded in terms of the economists concept of scarcity.[51] Coastal land and water resources, public tax dollars, private capital, and time are all scarce. Valuable and irreplaceable tracts of coast land and offshore water areas are being developed (by public and private action or a combination of the two) and in many instances exploited, wasted, and needlessly destroyed. There is a limit. Bad planning or the absence of planning coupled with an absence of even those few land and water use control devices most necessary to an organized society inevitably raises not only the costs of government but of private development as well. Irretrievable losses occur. Some of the beauties and grandeur of the Maine coast are already gone forever. Some coastal cities will never know anything but the chaos brought about by past unplanned development. Some of the delicate balances of nature along the Maine coast have been permanently upset.

No one discipline, group of technicians, citizens group, industrial interest, or political party working alone can deal with the situations described. A coordinated, cooperative, and broad-based approach with state government playing a leading role is necessary. The economist,

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50. Hatch, Ecological Considerations: Sea and Shore, Center for Resource Studies, Bowdoin College, The Maine Coast: Prospects and Perspectives 29 (1967).

51. P. Samuelson, Economics An Introductory Analysis, 17 (5th ed. 1961).

biologist, planner, lawyer, political leader, and the general public must unitedly design and opt for sound planning and the imposition of a range of controls which will end the era of exploitation and ad hoc development of our coastal (land and water) resources. We must find ways to allow both public and private development to proceed efficiently and economically, but when public and private ends are in conflict, we must not hesitate to use governmental power to strike whatever balance will achieve the greatest good.[52]

The powers of government (of the people) are many and can be marshalled to these ends. The question is -- do we have the will?

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52. An observation of Maine's Supreme Judicial Court with respect to regulations on the cutting of timber is particularly appropriate in this context, Opinion of the Justices, 103 Me. 506, 69 A. 627 (1908);
"...The amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated."
Id. at p.511, 69 A. at 629.

CHAPTER EIGHT STATE TAXATION OF MARINE RESOURCES*

INTRODUCTION

The taxes and licenses that affect marine resources and the development of marine resources in Maine range from an annual $3 shellfish license fee, which entitles the holder to dig or take, transport and sell clams, quahogs, mussels or oysters from the flats, shores or coastal waters of the State[1] and a $.25 per case excise tax levied and imposed upon the privilege of packing sardines[2] to a 4% corporate income tax[3] and a 1/2 cent per barrel license fee on the transfer of oil in Maine waters.[4] Although all taxes have a financial effect upon the taxpayer, this discussion of taxes and license fees will be restricted to those that have a significant impact upon marine resources and related industries.

Property Taxes

A general property tax is levied upon real and tangible personal property.[5] Within the cities and towns, the tax is administered by local officials and retained by the municipality. In unincorporated areas and

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1. 12 M.R.S.A. 4301 (Supp.).
2. 36 M.R.S.A. 4695 (Supp.).
3. 36 M.R.S.A. 5200 (Supp.).
4. P.L. 1969, c.572.
5. 36 M.R.S.A. 502.

in unorganized territories, the tax is administered by the State Tax Assessor and County Commissioner and collected by the State Tax Assessor. The requirement in the Maine Constitution that all taxes upon real and personal property be apportioned and assessed equally, according to the just value thereof,[6] requires equality and uniformity within each assessing district,[7] but it does not preclude exempting certain classes of property if done uniformly.[8] It also does not preclude tax differentials among assessing districts. For example, the 1969 rate in Bath was $38.00 per $1,000 with valuation at 100% of actual value, while the 1969 rate in neighboring Brunswick was $32.00 per $1,000 at 85% valuation.[9]

The property tax applies to all real property located in Maine and all tangible personal property of residents unless exempted by statute or Federal or State Constitutions. Personal property of non-residents which is within the State is taxed either to the owner, or to the person having the property in possession or storage.[10] Pleasure vessels and boats belonging to nonresidents and which are left in the state for purposes of repair and storage are exempted from the personal property tax as long as they were not regularly kept in the state during the preceding year.[11]

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6. Maine Constitution Art. IX, Sec. 8.

7. Brewer Brick Co. v. Brewer, 62 Me. 62 (1873).

8. Opinion of the Justices, 155 Me. 30, 152 A. 2d 81 (1959).

9. CCH State Tax Rep., Me. §71-001 (1970).

10. 36 M.R.S.A. 603.

11. 36 M.R.S.A. 655 (Supp.).

Other exemptions include governmental or public property,[12] property belonging to benevolent and charitable institutions,[13] household furniture, wearing apparel, farming utensils and mechanics' tools,[14] industrial disposal systems that produce no by-products which are marketed or used in the process of production,[15] and property in interstate commerce.[16] Personal property employed in trade and manufacturers' inventories of raw materials, unfinished and finished goods, are taxed on the average amount kept on hand for sale or processing during the preceding taxable year.[17]

Until 1951, when the sales tax was enacted, the property tax was the major source of revenue; it still is at the local level. The heavy reliance upon property taxes to raise revenue produces an undesirable economic climate for industrial and economic development of those marine resources which require a high investment in property and where net profits before taxes are low[18] because the real and personal property taxes are unrelated to profits and are not based upon ability to pay. States that do not impose a personal property tax on industry, and that tax real property at lower rates than does Maine, are at a competitive advantage

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12. 36 M.R.S.A. 651.

13. 36 M.R.S.A. 652 (Supp.).

14. 36 M.R.S.A. 655 (Supp.).

15. 36 M.R.S.A. 656.

16. 36 M.R.S.A. 655.

17. 36 M.R.S.A. 502.

18. Wightman, The Impact of State and Local Fiscal Policies on Redevelopment Areas in the Northeast,10-11 (Research Report to Federal Reserve Bank of Boston, No. 40, March, 1968).

in attracting new industry.[19] Within the State there are significant property tax differentials, both real and personal; the heavy reliance on local property taxes as a major source of revenue, which have a direct impact on manufacturing firms and economic activity, produces intra-state competition for industry.[20] Even when taxes are a small part of total business costs, tax differentials may affect locational decisions because they reinforce other cost differentials.[21]

Marine related industries can also suffer from the personal property tax in a different way. The boating industry and related businesses are economically depressed by the personal property tax on boats because of problems caused by evasion and improper assessment.[22] Resident boat owners can evade the personal property tax on their boats by registering and storing their boats in states which impose no personal property tax on boats; non-resident boat owners who have regularly kept their boat in the state during the preceding year may escape taxation by storing and repairing their boats elsewhere. This causes a decline in the businesses which repair, refinish and store boats.[23] This, in turn, causes a decline in other marine sales.

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19. Id. at 8-14.

20. Id. at 12.

21. Netzer, Economics of the Property Tax 113 (Brookings Institution, 1966).

22. Maine Sunday Telegram, February 22, 1970, at 9B; See also Report of the Citizens Task Force on Municipal and State Revenues to Governor Curtis, 85 (November 1968).

23. Maine Sunday Telegram, February 22, 1970, at 9B.

The problem of interstate competition has become more acute in recent years because the level of State and local taxes, relative to the size of the nation's economy, has increased sharply causing tax differentials which were inconsequential when the levels of taxation were low to be of significance now.[24]

Reduced reliance on real and personal property taxes as revenue measures would not only directly help the development and growth of marine resources by taxing on a more rational basis, but would assist by reducing interstate competition and intrastate tax differentials. Other states have provided property tax exemptions for new industry, negotiated property tax concessions, and minimized personal property taxes to attract industry and improve economic conditions;[25] theoretically, Maine's Constitution precludes using these approaches, which are themselves subject to inequities and unfairness. Relief would be available, however, if the new State income tax were used as the major source of State revenue but with increased tax sharing with cities and towns and by using a part of the sales tax as a local revenue measure. This would slow the rate of increase of the property taxes for local revenue.

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24. U.S. Advisory Commission in Intergovernmental Relations, Fiscal Balance on the American Federal System 116 (1967).

25. Id. The author is aware that many factors control the choice of industrial location, but property tax differentials can be a significant factor.

Sales and Use Tax

In 1951, Maine first enacted a sales and use tax;[26] in 1969, the rate became 5%.[27] The tax is imposed on the value of all tangible personal property and telephone and telegraph service sold at retail in Maine and upon the rental charged for living quarters in hotels, rooming houses, tourist or trailer camps, in each case measured by the sale price.[28] A use tax is imposed on the storage, use or other consumption in Maine of tangible personal property purchased at retail, unless the person storing, using or consuming the property has taken a receipt from the seller showing that the seller has collected the sales or use tax.[29] Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of tangible personal property, is exempted from the sales and use taxes[30] but fuel used in manufacture is not exempt; packing and packaging materials are exempt.[31] In 1969, the Legislature exempted sales of water and air pollution control facilities.[32] The numerous other exemptions from the sales tax are listed in 36 M.R.S.A. 1760.

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26. P.L. 1951, c.250.

27. 36 M.R.S.A. 1811 as amended by P.L. 1969, c.295.

28. Id.

29. 36 M.R.S.A. 1861 (Supp.).

30. 36 M.R.S.A. 1752 (Supp.).

31. 36 M.R.S.A. 1752 (Supp.).

32. 36 M.R.S.A. 1760 (29,30) as added by P.L. 1969, c.471.

Because machinery, furniture, equipment, and fixtures used in a business or in manufacturing associated with marine resources are subject to the sales or use tax, these taxes constitute a significant element in the cost of locating a new business or expanding existing ones and can influence interstate competition for businesses and industries associated with marine resources.[33] The theory behind exempting physical ingredients is that a tax on them would result in multiple taxation of the final product.[34] The same reasoning should apply to fuel, machinery and supplies;[35] but legislators have not been convinced, possibly because exempting machinery and fuel would excessively reduce the sales tax revenue, and would create administrative problems.[36] The major factor favoring such an exemption is that it would remove the tax as an element of business purchases and eliminate an artificial barrier against investment in the State.[37]

Income Tax

On June 28, 1969, Maine became the 36th state to enact a state personal income tax;[38] it also enacted a corporate income tax. Forty three other states and the District of Columbia impose a state corporate income tax. The effective date of the tax for corporations was January 1, 1969, and for all other taxpayers, July 1, 1969. The rates for individuals

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33. Wrightman, supra fn. 17, at pp. 80, 131.

34. Due, Sales Taxation 298-99 (U. of Ill. Press, 1967).

35. Id.

36. Due, State Sales Tax Administration 182 (Public Administration Service, 1963).

37. Id.

38. 36 M.R.S.A. 5101-5342 as added by P.&S.L. 1969, c.154.

are graduated from 1% to 6%.[39] The corporate rate is 4% of Maine net income.[40] This compares to corporate rates in other states ranging from a graduated low of 1% in Arkansas to a 12% rate in Pennsylvania.[41] Maine's shift to an income tax, in addition to a State sales tax, to raise revenue is indicative of a nationwide movement toward a more balanced reliance on both forms of taxation.[42]

Generally, the terms used in the Maine Income Tax Law have the same meaning as in the Internal Revenue Code of 1954 and laws of the United States.[43] Resident individuals are taxed on their federal adjusted gross income, with minor modifications, less deductions and personal exemptions which parallel the federal, except that each personal exemption is $1,000.[44] The taxable income of a nonresident individual is that part of his federal adjusted gross income that is derived from sources within Maine, less deductions and personal exemptions.[45]

Corporations are taxed on their Maine net income, which is the taxable income of the corporation for that taxable year under the laws of the United States, allocated and apportioned to Maine according to the Uniform

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39. 36 M.R.S.A. 5111 as added by P.&S.L. 1969, c.154.

40. 36 M.R.S.A. 5200 as added by P.&S.L. 1969, c.154.

41. CCH State Tax Guide, All States, 1031 (1970).

42. U.S. Advisory Commission on Governmental Relations, supra fn. 24, at 131.

43. 36 M.R.S.A. 5102 as added by P.L. 1969, c.154.

44. 36 M.R.S.A. 5121, 5123, 5124 and 5126 as added by P.L. 1969, c.154.

45. 36 M.R.S.A. 5140, 5142, 5143, 5144 and 5145 as added by P.L. 1969, c.154.

Division of Income for Tax Purposes Act.[46] The three main factors in apportioning income are property, payroll and sales.[47] If the allocation and apportionment provisions do not fairly represent the extent of the taxpayer's business activity in Maine, the taxpayer may petition for, or the tax assessor may require the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.[48] The allocation and apportionment rules also apply to other than incorporated businesses. Corporations which have, under federal law, elected to avoid taxation as a corporation by having corporate income taxed to the shareholders, whether or not distributed as dividends, pursuant to Subchapter S of the Internal Revenue Code are not taxed as corporations under the Maine income tax law.[49]

A corporation may elect to pay a tax at the rate of 1% of its gross sales within Maine instead of an income tax if the corporation did not own or rent any real estate or personal property within Maine, had only sales activity within Maine, and if its gross sales within the State during the taxable year did not exceed $100,000.[50] Presumably this provision is inserted for administrative convenience to eliminate allocation problems where sales activity constitutes the only source of income.

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46. 36 M.R.S.A. 5102 as added by P.L. 1969, c.154.

47. 36 M.R.S.A. 5211 as added by P.L. 1969, c.154.

48. 36 M.R.S.A. 5211 (17) as added by P.L. 1969, c.154.

49. 36 M.R.S.A. 5102 as added by P.L. 1969, c.154.

50. 36 M.R.S.A. 5201 as added by P.L. 1969, c.154.

The conformity with federal laws was designed to simplify the preparation of returns, to improve enforcement by obtaining information obtained from federal income tax audits and to facilitate use of federal judicial and administrative determinations and precedents to aid interpretation of the law.

The income tax was enacted because revenues from existing taxes failed to keep up with expenditures and it was considered the most equitable and flexible new tax available to meet State needs.[51] It was expected to provide funds for expanded State financial aid to local governments, reducing the rate by which property taxes have been rising.[52] If this highly desirable goal is achieved and the income tax becomes the major tax on business activity, with a corresponding reduction in the property and sales taxes, it would serve to reduce existing economic hardships caused by the property and sales taxes and stimulate the economic growth of industries and businesses associated with marine resources.[53]

Oil Transfer License Fee

The First Special Session (1970) of the Maine 104th Legislature enacted legislation relating to coastal conveyance of petroleum.[54] Although the license fee imposed by this legislation is not directly related to

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51. Report of the Citizens Task Force on Municipal and State Revenues to Governor Curtis, 5 (November, 1968).

52. Id. at p.6.

53. Wightman, supra fn. 18, at 8-14.

54. 38 M.R.S.A. 541-557 as added by P.L. 1969, c.572. See p.624 for complete text.

the property, sales, and income taxes, it is important because it affects marine resources associated with oil and is designed to protect coastal and marine resources. The preamble states the following findings and purpose:

> The Legislature finds and declares that the highest and best uses of the seacoast of the State are as a source of public and private recreation and solace from the pressures of an industrialized society, and as a source of public use and private commerce in fishing, lobstering and gathering other marine life used and useful in food production and other commercial activities.
>
> The Legislature further finds and declares that the preservation of these uses is a matter of the highest urgency and priority....
>
> The Legislature further finds and declares that the transfer of oil, petroleum products and their by-products between vessels and vessels and onshore facilities and vessels within the jurisdiction of the State and state waters is a hazardous undertaking; that spills, discharges and escape of oil, petroleum products and their by-products occurring as a result of procedures involved in the transfer and storage of such products pose threats of great danger....
>
> The Legislature intends by the enactment of this legislation to exercise the police power of the State through the Environmental Improvement Commission by conferring upon said commission the exclusive power to deal with the hazards and threats of danger and damage posed by such transfers and related activities; to require the prompt containment and removal of pollution occasioned thereby; to provide procedures whereby persons suffering damage from such occurrences may be promptly made whole; and to establish a fund to provide for the inspection and supervision of such activities and guarantee the prompt payment of reasonable damage claims resulting therefrom. [55]

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55. Id.

The Act creates a Maine Coastal Protection Fund for the inspection and supervision of oil transfer activities and guarantees the prompt payment of reasonable damage claims resulting therefrom.[56] It is a nonlapsing, revolving fund limited to the sum of $4,000,000.[57] All license fees, penalties and other fees and charges will be paid into the fund and all expenses, including administrative expenses, costs of removal of discharges of pollutants and third party damages, will be charged to the fund.[58] The fund will be derived principally from annual license fees determined on the basis of 1/2 cent per barrel of oil, petroleum products or their by-products transferred by each "oil terminal facility" during the licensing period, and paid monthly on the basis of records certified to the commission.[59] Certain exemptions minimize the impact of the Act on all but major oil-handling industries: Marinas engaged in the business of servicing the fuel requirements of pleasure craft, fishing boats and other commercial vessels, where the purchaser and the consumer are the same entity and the serviced vessel is 75 feet or less in overall length, are exempted from the licensing fee.[60] The reason for the exemption is that marina operations are not likely to cause significant damage to marine, estuarine and terrestrial environment, considering the limited nature of their operations

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56. 38 M.R.S.A. 541 as added by P.L. 1969, c.572.

57. Id.

58. Id.

59. Id.

60. 38 M.R.S.A. 545 as added by P.L. 1969, c.572.

and the small quantities stored.[61] Also exempted, by virtue of the definition of "oil terminal facility", are terminals with a capacity of less than 500 barrels and facilities not engaged in the transfer of oil, petroleum products or their by-products to or from tidal waters of the State.[62]

It is anticipated that the license fee will be paid by at least three types of facilities:

1. Facilities receiving domestic crude oil from ships for refining or transhipment in intrastate and interstate commerce;
2. Facilities receiving foreign crude oil from ships for storage and transhipment through pipelines to refineries in Canada; and
3. Facilities receiving refined domestic oil from ships for consumption in Maine or transhipment in interstate commerce.

These three types of transfers have caused the constitutionality of the tax to be questioned.[63]

Constitutionality

The clauses of the United States Constitution which relate to the question of the constitutionality of the license fee are the Commerce Clause,[64] the Import Clause,[65] the Tonnage Clause,[66] and the Fourteenth Amendment's Due Process Clause.[67]

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61. Id.

62. 38 M.R.S.A. 542 as added by P.L. 1969, c.572.

63. Portland Press Herald, February 3, 1970, at p.6.

64. U.S. Constitution, Art. I, Sec. 8, Cl. 3.

65. U.S. Constitution, Art. I, Sec. 10, Cl. 2.

66. U.S. Constitution, Art. I, Sec. 10, Cl. 3.

67. U.S. Constitution, Fourteenth Amendment.

The question with respect to the constitutionality of the license fee is difficult to resolve. The Import Clause and Commerce Clause present problems of great sensitivity that have caused the United States Supreme Court to refrain from issuing general rules, but rather to act on a case by case basis.[68] From an initial posture indicating a complete prohibition against state taxation of imports[69] and interstate commerce,[70] there has been a process of judicial adjustment which demonstrates that the prohibition is not absolute.[71]

Commerce and Due Process Clauses

A tax which is a restraint or a burden on interstate commerce is unconstitutional,[72] but the burden must be real[73] or material.[74] Especially vulnerable is a tax which subjects commerce to multiple burdens or may be imposed by successive states as the property passes from state to state.[75] Because the license fee is on the transfer of oil from ship to shore, shore to ship, or ship to ship, it can be repeated only in other ports, reducing the possibility of multiple taxation.

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68. See Opinion of Justice Frankfurter in Freeman v. Hewitt, 329 U.S. 249, 252 (1946).

69. Brown v. Maryland, 25 U.S. (12 Wheat. 419) (1827).

70. Reading Railroad Co. v. Pennsylvania, 82 U.S. (15 Wall) 232 (1872).

71. Freeman v. Hewitt, 329 U.S. 249,251 (1946); Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959).

72. Pullman Co. v. Richardson, 261 U.S. 330 (1923).

73. United States Exp. Co. v. Minnesota, 223 U.S. 335 (1912).

74. Real Silk Hosiery Mills v. Portland, 268 U.S. 325, 335 (1925).

75. Gwin, White & Prince v. Hennerford, 305 U.S. 434 (1939).

Operating almost as exceptions to the general rules under the Commerce Clause are the compensatory highway use taxes. To the extent that the annual license fee resembles the highway use taxes, and the purpose of the fee is similar to the purpose of the highway use taxes, the imposition of the license fee would seem constitutional. Although a state may not lay a tax on the privilege of engaging in interstate commerce, it may impose a charge, as compensation for the use of the public highways, which represents a fair contribution toward the cost of constructing and maintaining them and of regulating traffic thereon.[76] The only restrictions are that the tax be equal on interstate and intrastate traffic, that it be used to defray costs and not be a privilege tax, and that the amount be fair.[77] The factors which determine the fairness of the charge are the cost of constructing and maintaining the highways and the cost of regulating traffic thereon.[78] The United States Supreme Court's language in Aero Transit Co. v. Commissioners is equally appropriate to the oil transfer license fee:

> Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish these facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects.[79]

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76. Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 185 (1931).

77. Capital Greyhound Lines v. Brice, 339 U.S. 542 (1950).

78. Ingels v. Morf, 300 U.S. 290 (1937).

79. 332 U.S. 495, 503 (1947).

The harbors and waterways are similar to the state's highways; the fee will be used for maintenance and control of the harbors and waterways; the tax has a fair relationship to the use of the harbors and the potential cost of pollution related to this use. All of these factors may support the constitutionality of the fee under the compensatory highway use tax rationale.

The potential problem under the Fourteenth Amendment relates to whether the proper nexus for taxation exists. With respect to property taxation and due process the United States Supreme Court has been concerned with "whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State."[80] If the license fee meets this test, there should be no problem with the fee under the Fourteenth Amendment.

Import Clause

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws....[81]

The Import Clause presents a seemingly absolute prohibition upon the power of the states to tax foreign products imported or exported. There is, however, a point of time when the prohibition ceases.[82] Later cases

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80. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949), rehearing denied 336 U.S. 928 (1949).

81. U.S. Constitution, Art. I, Sec. 10, Cl. 2.

82. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 442 (1827).

have discussed the limits of the states' powers,[83] but in no case is the conflict between a state's police or regulatory power and the Import Clause as clearly raised as in the Coastal Conveyance of Petroleum Act. New approaches will have to be used to support the constitutionality of the Act under the Import Clause, unless of course the oil is not an "import" because of its almost immediate shipment out of the country to Canada.

The inspection law exception has been applied very narrowly by the United States Supreme Court to include only the actual cost of inspection, but this exception nas not been considered by the Court in recent years.[84] Moreover, the findings and purpose of the Act seem to preclude a theory that the fee is an inspection fee,[85] except to a very small extent.[86]

There is nothing to preclude the application of the compensatory highway use tax theory which was discussed under the Commerce Clause. Although there are no known exemptions to the highway use taxes for a truck carrying imports from a seaport to Canada, there are no highway use tax cases under the Import Clause. Because the rationale of these taxes is that they are for maintenance and regulatory costs incurred by the State,

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83. See Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

84. Bowman v. Chicago & C. Railway Co., 125 U.S. 465 (1888); Turner v. Maryland, 107 U.S. 38 (1883).

85. 38 M.R.S.A. 541 as added by P.L. 1969, c.572.

86. 38 M.R.S.A. 566 (4) as added by P.L. 1969, c.572.

an exemption for a truck travelling from Maine to Canada would be inappropriate.

There is also a question of whether this transfer license fee is an "impost" or "duty" within the meaning of the Import Clause. In discussing the meaning of "duty" under the Tonnage Clause,[87] the Supreme Court has said: "But a charge for services rendered or for conveniences provided is in no sense a tax or a duty."[88] Because the Coastal Conveyance Act provides a quid pro quo,[89] the license fee may escape characterization as an impost or duty under the theory of Packet v. Keokuk.

> Nothing...justified the assertion that either wharfage or port charges are duties of tonnage, merely because they are proportioned to the actual tonnage or cubical capacity of vessels. It would be a strange misconception of the purpose of the framers of the Constitution were its provisions thus understood. What was intended by the provisions of the second clause of the tenth section of the first article was to protect the freedom of commerce and nothing more.[90]

To a large extent the Import Clause parallels the Tonnage Clause in purpose[91] and the meaning of "duty" may be the same under both clauses.

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87. U.S. Constitution, Art. I, Sec. 10, cl. 3.

88. Packet Co. v. Keokuk, 95 U.S. 80, 84 (1877).

89. 38 M.R.S.A. 551 as added by P.L. 1969, c.572.

90. 95 U.S. 80, 87 (1877).

91. Hoover & Allison Co. v. Evatt, 324 U.S. 652, 656 (1945).

The Supreme Court has also indicated that the range of immunity is not as wide when the fee or tax is being levied on the activities connected with the export or import rather than on the goods themselves.[92]

Tonnage Clause

> No State shall, without the Consent of Congress, lay any Duty on Tonnage.[93]

This clause prohibits a state from charging duties upon vessels coming in from other ports where the local government has not rendered services to the vessels.[94] It is a levy based upon the capacity of the vessel. The Maine license fee is levied on the process of transfer and consequently it is not a tonnage charge.

CONCLUSION

Maine's taxes represent a patchwork of uncoordinated tax legislation which has developed over a long period in response to the State's revenue needs. The real property tax and sales tax are criticized because of their regressivity; the real property tax is attacked because it is unfair to persons on fixed income. The personal property tax on boats is causing a decline in the boat building industry and related business. The real and personal property taxes are burdensome to marine industries and economic activities because they are unrelated to profits. The sales tax on

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92. Canton Railroad Co. v. Rogan, 340 U.S. 511, 514-15 (1951).

93. U.S. Constitution, Art. I, Sec. 10, cl. 3.

94. Cox v. The Collector, 79 U.S. (12 Wall) 204 (1870).

machinery and fuel used in manufacturing results in double taxation and impedes economic expansion. The income tax is looked upon as one more onerous burden.

There are proposals to repeal the income tax, to eliminate the real property tax, to eliminate the personal property tax and to return a percentage of the sales tax to the cities and towns.

Elimination of the property tax would produce undesireable side effects; income tax or sales tax rates would have to be increased substantially. A return of the sales tax to the sales district would cause inequities based upon selling patterns. Repeal of the income tax would force a significant increase in the sales tax. A program which would combine all of the above is needed; real property tax reform coupled with State and local tax sharing of both the income and sales tax would reduce most of the inequities, but other alternatives may be available and should be explored.

Marine resources are unique - to a large extent, their economic development is dictated by geography. Yet not all business activity associated with marine resources is captive; interstate and intrastate competition does exist[95] and State tax reform would contribute to the growth and development of economic activity associated with marine resources.

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95. The present tax system lacks economic neutrality between industries and businesses. A marine resource related activity requiring a substantial investment in land pays more than one that doesn't, yet it may require no more in services.

CHAPTER NINE EROSION

People who live by the seashore are always threatened by the sea.[1]

STATUTORY

There is no State agency or body of Maine law to deal in any significant way with the problem of coastal erosion -- either to prevent its occurrence or to alleviate its effects. The Soil and Water Conservation Commission has a great interest in the subject, but its jurisdiction for all practical purposes stops at the high water mark.[2] This agency does catalog areas of the Maine coast where severe erosion is present, but the Commission has been given no specific authority to deal with the problem. Its recommendations are only advisory, and implementation of its suggestions is dependent upon the concurrence of riparian landowners.[3]

State government is not normally involved with coastal erosion. Even when called upon in times of crisis, it does not have the administrative machinery nor the technical personnel to cope with the problem. The nature of the problem and the extent of the inadequacy are illustrated in the example set out in the Appendix to this chapter. An erosion situation at Camp Ellis, Saco, is described in detail to show the progression

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1. Vytu Adnreliunas, Assistant Chief of Operations, Corps of Engineers, New England Division, Meeting, Saco, Maine, February 28, 1969.

2. Interview with Charles Boothby, Executive Director of the Soil and Water Conservation Commission, March 4, 1969; see Vol. I, p.58.

3. 12 M.R.S.A. 4.

of administrative activity set into motion by political pressure. The account does not purport to pass judgment on engineering aspects of the project.

Federal

The U. S. Army Corps of Engineers is responsible for planning, designing, and implementing projects pertaining to navigation, harbor improvements, and coastal erosion. While State and local approval, and in most cases matching funds, are required for any project, there is no competent State agency to make an independent appraisal of the engineering feasibility of the project. This means that the Corps of Engineers is supplying not only the best judgment, but for most installations, the only judgment. Short of building a model and simulating conditions of sand, wind, waves, tides, etc. (an expense that could exceed construction costs of the actual project) there is no certainty that a specific design will achieve the anticipated results.[4] Unless some provision for damages are specified, however, the State must agree to hold the federal government harmless from resulting claims.

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4. The fact that the Corps has not always been right was implicit in a report: Effective Uses of the Sea, Report on the Panel of Oceanography President's Science Advisory Committee, The White House, June, 1966 at p.25.

4.8 Surf Zone and Beach Engineering Problems

The nation needs to improve the technology for constructing coastal zone structures, which will make the national expenditure on breakwaters, harbors, beach erosion, docks, etc., more effective. The Panel was distressed to find a high failure rate of construction projects in the surf zone and on beaches, the destruction of beaches by breakwaters designed to extend the beaches, the silting of harbors and marinas as a result of construction designed to provide shelter, and the enhancement of wave action by the building of jetties supposed to lessen wave erosion are but a few examples of the inadequacy of our knowledge and practice in coastal construction.

Statutory Provisions for Municipal and State Participation

Municipal authority to enter into an agreement for navigation improvements and prevention of erosion has been granted by the Legislature.[5]

> Sec. 3553 (1). Improvement of navigation and prevention of erosion.
>
> A municipality may acquire real estate or easements by the condemnation procedure for town ways as provided in Title 23, and may contract with the State and Federal Governments to comply with requirements imposed by the Federal Government in authorizing any project which has been approved by the Governor for improving harbor and river navigation or preventing property damage by erosion or flood.
>
> 1. Municipalities may act jointly. Two or more municipalities may act jointly in performing the operations authorized by this section.[6]

Municipalities may raise or appropriate money for projects which have been approved by the Governor for improving navigation or preventing property damage by erosion or flood.[7]

The Governor has the following statutory powers which he may exercise with the consent of the Executive Council:[8]

A. Designate a State agency to make any investigation considered necessary.

B. Provide for the payment by the State of not more than one half of the contribution required by the Federal Government, when an appropriation has been made for it by the Legislature.

C. Make an agreement with the Federal Government to hold and save it harmless from resulting claims.[9]

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5. 30 M.R.S.A. 3553.

6. Id.

7. 30 M.R.S.A. 5103 (3).

8. 30 M.R.S.A. 3553 (2).

9. Id.

COMMON LAW

As discussed in Vol. II, p.214, there is a theory or fiction of law that flats as they now exist are presumed to have always so existed. This would mean that at Camp Ellis ownership would be possible in the flats to 100 rods or low water mark which ever was less. Although it has never been adjudicated in Maine, it is assumed that private ownership would be extinguished by erosion at such a time that flats extended beyond 100 rods or were covered by water at all stages of the tide.

If ownership were to be extinguished, but at some future time the land reappeared, the owner of the adjacent flats rather than the former owner would be entitled to the new land. "An increase in alluvion either from natural causes or a combination of natural and artificial causes must be to the benefit of the owner of the upland or to him who owned the flats to which the increase was attached."[10]

> The conclusion arrived at by us does not clash with the principle well settled that where the right to the soil under the water belongs to a subject, he is entitled to all increments coming thereon.[11]

Hope for the return of the beach is evidenced by the fact that the owner of the lots that were formerly upland, continue to pay taxes[12] on what are

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10. Adams v. Frothingham, 3 Mass (Tyng) 331, 363-4 (1807). See discussion Seashore Property Owners, Accretion, Avulsion, and Reliction, Vol. II, p.214.

11. Babson v. Tainter, 79 Me. 368, 374 10 A. 63 (1887).

12. Conversation with Saco Tax Assessor, Fred Decoteau, March 29, 1970.

now flats exposed only at low tide. Should the beach again become upland, by Maine law these persons would be entitled to new land so formed.

POLICY

The Camp Ellis situation has a greater significance in the development of Maine's marine resources than the resolution of an erosion problem in Saco. For example, other coastal communities suffering severe erosion will undoubtedly demand comparable assistance -- a fact that dictated restraint in rushing emergency aid to Camp Ellis. Similarly, Camp Ellis has similar implications for proper land utilization: If soil suitability indicates a stretch of the shore is unsuitable for housing development, should bulkheads, sea walls, and breakwaters be built to protect the shore? The cost of this type of preventive construction runs high.[13] It would be hard to justify the expenditure of large sums of public money to preserve private structures whose monetary value is well below the cost of such construction. Or should the shore property be reserved for recreation? If the government is not justified in spending such money, does this mean that residing by the sea and the aesthetic and recreational enjoyment of this common property resource of the ocean must be limited to those in an economic position to construct expensive sea walls? If there are to be substantial State or Federal expenditures for erosion control, (other than in the name of navigation) how should the effort be allocated? Consideration must also be given to the fact that alleviating the problem in one area, may aggrevate the problem elsewhere or endanger an area not now threatened.

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13. See Vol. I, p.61.

The law of ownership in the intertidal area[14] is also important in planning erosion control. The State would do well to consider buying up flats and tidal areas before extensive control work was undertaken. This would enable the State to use any newly created land for recreational purposes or designate other appropriate uses with a minimum of expenditure.

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14. See Vol. II, p.186 et seq.

APPENDIX

PERREAULT v. THE CORPS OF ENGINEERS -- A CASE HISTORY

"The Interest of Navigation is Paramount"

In the fall of 1968, the Corps of Engineers sealed the jetty on the north side of the Saco River and repaired the inshore end of the jetty; the jetty on the Biddeford side of the River was also repaired and made higher. The channel was then to be dredged and the deposit of spoil placed on the beaches on both sides of the river.[1] After the jetty was sealed, federal funds for the dredging operation were frozen pursuant to the cash expenditure limitations imposed on the Corps' work program by the Revenue and Expenditures Control Act of 1968.[2]

Mrs. Perreault and the residents of the Camp Ellis section maintained that sealing and extending the jetty had intensified coastal erosion; that six to eight feet of sand had been eaten from the beach; and that their cottages were doomed. Pressure from residents for an investigation of the cause of the increased erosion and for relief to residents of the beseiged area led to a meeting[3] in the Mayor of Saco's office. In attendance were representatives of the Corps of Engineers, a representative of the District Congressman who had arranged the meeting, town officials from Saco and Biddeford (including the Chairman of the Biddeford-Saco Joint River Committee), and residents of the Camp Ellis area. The following points were set forth at the meeting.

Historical

Erosion has been a problem in the immediate vicinity for a long time. A 1938 Assessor's map shows three shorefront lots between Mrs. Perreault's cottage and the ocean which have since washed out. (See Illustration No. 1). A Congressional Study of the problem was made in 1956.[4] Construction on the present jetty began around the turn of the century; substantial repairs were made on it in 1958. A more recent study had recommended that the present breakwater be extended further back toward the shore where it was being outflanked. The implementation of the project was approved by the City of Saco despite protests from Mrs. Perreault.

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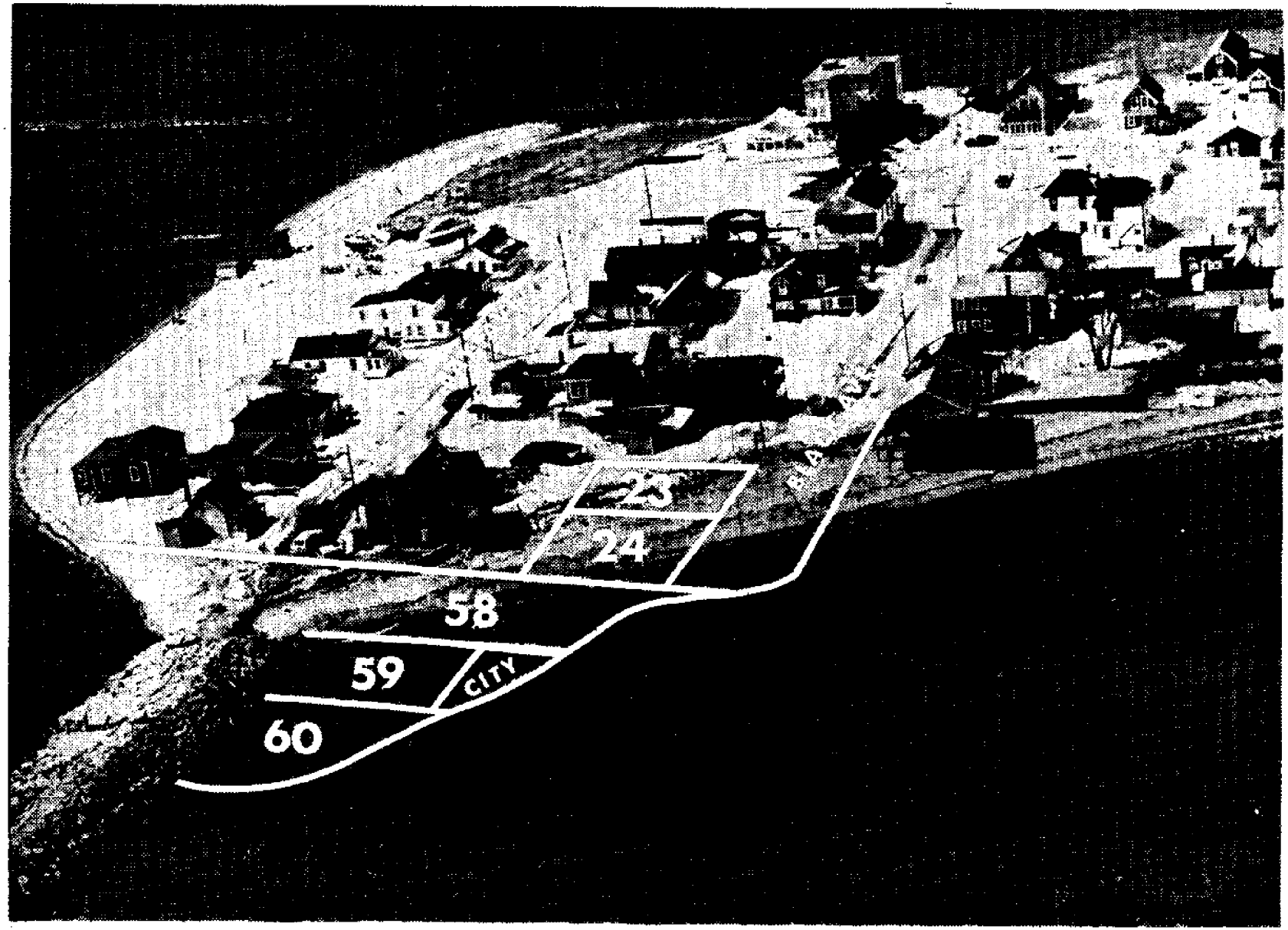
1. Authorized by the 1960 Rivers and Harbors Act as amended in 1964, Project approved by the Corps, November 14, 1967.

2. Letter from Col. Frank P. Bane, Division Engineer, Corps of Engineers, to Congressman Peter N. Kyros, January 10, 1969. A cut in domestic spending was the price enacted by Congress for passage of the 10% Income Surtax Bill.

3. February 28, 1969.

4. Saco Maine Beach Erosion, April 26, 1956. House Doc. 32, 85th Congress, First Session.



THE VANISHING EARTH — Shown here is the point of land at Ellis Beach, Saco, that is threatened by an erosion problem claimed to have been caused by work on the jetty shown in the picture. Residents claim each time the jetty is extended inland, it sets the house on the point up for destruction. The outlines show the point as it existed in the 1950's. The first lot, (60), owned by Mr. and Mrs. Archie Goudreau of Lewiston, washed away between 1955 and 1958. The next, (59), owned by Mr. and Mrs. Stanley G. Leonard of Old Orchard Beach, went in 1958, and the third, (58), owned by Mr. and Mrs. M. Eugene Hilt of Saco, went in 1961. The others, marked 24 and 23, owned by J. B. Louis Simoneau, the large section on the other side of the jetty, owned by Mr. and Mrs. Lawrence Ladd of Portland, and the small piece to the right, owned by the city, disintegrated between 1950 and 1960.

Residents' Position

A substantial portion of the beach had disappeared in the December, 1968 storms; the reason for such loss was at issue. Mrs. Perreault and the other residents of the areas claimed that repairing and sealing the jetty caused the dramatic loss of sand. They also claimed that the problem would be alleviated if the breast jetty, built at 70° to the main jetty to protect the jetty, were elevated. The residents sought relief if it could be proved that the sealing of the jetty and repairs had accentuated the erosion.

Position of the Corps

While not authorized to spend money for the protection of private property, in planning projects the Army Corps of Engineers purports to consider probable damage of privately owner land, but must consider the interest of navigation paramount. It may undertake operations or remedial action which will materially benefit private property, e.g. pumping sand on the beach from the dredged channel, but such action must be justified in the name of navigation.[5] The Corps emphasis on the paramountcy of navigation - an incomprehensive concept to persons seeing their home being washed away by the sea - was interpreted by the residents to mean that the federal government has no concern for the welfare of the people. The Corps representative, in maintaining that the Corps had neither authority nor funds to provide relief in instances such as Camp Ellis, did suggest that redress might be available through other channels.[6]

Act II

In the absence of any concrete action after the first meeting, a second meeting was called four days later by the Governor at the request of the District Congressman. Participants at this session,[7] held in the Office of the State Director of Civil Defense in Augusta, included: the State Director of Civil Defense, the Adjutant General, the Commandant of the National Guards, the Federal Soil Conservation Committee representative, the Executive Director of the Maine Soil and Water Conservation Commission, the Commissioner of Sea and Shore Fisheries, the Mayors of Saco

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5. Mr. Adnreliunas, February 28, 1969.

6. Id. An example would be a gubernatorial appeal to the President of the United States to declare an emergency; if so declared federal funds (other than those budgeted for the work of the Corps) might be released or made available.

7. March 4, 1969.

and Biddeford, the Congressman's representative, a representative of the Governor, a member of the Executive Council, Mrs. Perreault, and other interested persons. In the interim, sand bags had been placed on the endangered parcels by the State Civil Defense organization which involved the State Civil Defense, the York County Civil Defense, the Saco police, public works, and fire personnel, and Civil Defense and municipal employees from Cumberland County.

According to its Commandant, the National Guard could act only in the event of a declared Civil Defense emergency; at such time all municipal, regional, and State resources would have to be mobilized. A temporary beachhead could be established if it were shown to be feasible. The problem of obtaining scarce sand and fill was next brought up. Recommendations of bulldozing a sand dune built up at Old Orchard Beach evoked a documented warning from the State Soil Conservation Director that you might be just transferring the problem. He emphasized that even if loose sand was brought in, sand bags should be placed on top of it. He further noted that soil suitability should be a guide for land use in Maine and noted that the Camp Ellis Beach had unsuitable soil conditions for the present cottages. He posed the questions, whether we are going on record as perpetuating poor land use, and are we willing to spend money on what will be washed out again.

The possibility of State resources to help relocate and move the persons whose cottages were endangered appeared bleak. A declaration of an emergency by the Governor would be necessary to authorize such an expenditure, but even if there were such a declaration, there were no funds available.

The consensus that evolved was that what was needed was a feasible plan, approved by some person or organization, which would set forth: "This is what we propose to do; this is what it will cost, and this is what we expect it to accomplish." The meeting adjourned with the recommendation that the Governor's office urgently request the Corps of Engineers to prepare a comprehensive recommendation for action, and that the Governor and Council allocate money to replace the sand bags already used.

Finale

According to expert advice, none of the methods considered as stop gaps would be effective. Instead, steps were taken to unfreeze federal funds that had been previously designated for the dredging of the channel. These funds were eventually released, dredging of the Saco River proceeded, and the fill was placed on the beaches. Since March 1969, Mrs. Perreault has moved; and the Corps of Engineers has undertaken a study of erosion of the beaches of southern Maine.[8]

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8. Conversation with Mr. Jerome Plante, Assistant to Congressman Peter H. Kyros, March 24, 1970.

CHAPTER TEN REVIEW OF NEW LEGISLATION IN SPECIAL SESSION, 104th LEGISLATURE

Laws pertaining to marine resources passed at the Special Session of the Legislature, January 6-February 7, 1970 are catalogued below. The full text of the act preventing the dumping of out of state waste, the site selection bill, and the coastal conveyance of petroleum bill are reproduced in full. The Site Selection Act is discussed infra, in Part II.

I SELECTIVE LEGISLATION

P.L. 1969, c.513 An Act to Improve Sanitary Standards fo Stop Unlawful Sales of Shucked Shellfish

12 M.R.S.A. 4302A was added to require special authorization from the Commissioner of Sea and Shore Fisheries to sell shucked shellfish in intrastate trade. See Vol. IV, Fisheries.

P.L. 1969, c.523 An Act Relating to Dumping Offal and Feathers on Highways

17 M.R.S.A. 2251 was amended to add offal and feathers to prohibited items. See Chapter 5 this volume.

P.L. 1969, c.535 An Act Relating to Enforcement by Sea and Shore Fisheries and the Maine Mining Bureau

12 M.R.S.A. 3752(6) was amended to modify procedure on suspension of licenses. 10 M.R.S.A. 2155 was amended to give the Maine Mining Bureau power to make certain regulations under the Gas and Oil Development Act. See Vol. IV, Maine Mining Laws.

P.L. 1969, c.546 An Act Relating to Grants and Interest-free Loans for Preliminary Planning of Pollution Abatement Facilities

38 M.R.S.A. 412 was repealed and superseded to provide criteria and schedules for grants and loans to municipalities, municipal corporations, regional planning commissions, and council of governments for planning of pollution abatement facilities. See Chapter 5, this volume.

P.L. 1969, c.547 An Act to Clarify the Interest Cost for Local Industrial Recreational Bonds

30 M.R.S.A. 5331(2) was amended to remove 6% ceiling on interest rate for bonds. See Vol. I, p.35.

P.L. 1969, c.551 An Act Relating to Permits For Dredging and Erection of Causeways, Docks, etc. in Tributaries of Great Ponds

Requirement for permits to dredge, build marinas, docks or causeways in Great Ponds was extended to tributary rivers or streams of Great Ponds. See Vol. I, p.94.

P.L. 1969, c.558 An Act Repealing Property Tax Certificate Requirement for Registration of Watercraft

Modifications of procedures for registering watercraft. See Vol. I, p.110; Chapter 8 this volume.

P.L. 1969, c.566 An Act Relating to Easements in Lands

33 M.R.S.A. 667, 668 was added to define conservation restrictions and power of governmental bodies to obtain and enforce such restrictions. See Chapter 6 this volume.

P.L. 1969, c.567 An Act Relating to Waste Discharge Provisions

38 M.R.S.A. 414(1B) was amended to make financial ability to meet State's water pollution control standards a consideration in EIC's granting applicant a license to discharge. See Chapter 5, this volume.

P.L. 1969, c.569 An Act Relating to Prerequisites for the Insurance of Mortgages by the Maine Industrial Building Authority, Maine Recreation Authority and the Municipal Securities Approval Board

Act provides for coordination of State guaranteed loans and municipal revenue producing bonds with license requirements of the EIC. See Vol. I, p.35; Chapter 5 this volume.

P.L. 1969, c.570 An Act Prohibiting Dumping of Out of State Waste Matters

Complete text p.627 this Chapter. See also Chapter 5 this volume.

P.L. 1969, c.571 An Act to Regulate Site Location Development Substantially Affecting Environment

Complete text p.623 this Chapter. See also Part II, this Chapter.

P.L. 1969, c.572 An Act Relating to the Coastal Conveyance of Petroleum

Complete text p.624 this chapter. See also Chapter 5 and 8 this volume.

P.L. 1969, c.581 An Act Relating to Water Quality Standards

12 M.R.S.A. 2108 was added to provide for designation of spawning beds in inland waters. See Vol. I, p.102.

P.&S.L. 1969, c.239 An Act to Authorize General Fund Bond Issue in the Amount of $4,000,000 for Removal and Abatement of Prohibited Discharges of Oil from Coastal Water, Lands Adjoining the Seacoast of the State or Waters Draining Into the Coastal Waters of the State in the Advent of an Oil Pollution Disaster Declared by the Governor

Bonds are to be issued to fund Maine Coastal Protection Fund (38 M.R.S.A. 551 as added by P.L. 1969, c.572). See p.624 this chapter.

II REMARKS - SITE SELECTION BILL*

Environmental protection, and particularly protection of the Maine Coast, was the popular "cause" in 1969, as it is in 1970. The fact that large areas of the Maine Coast are free from any zoning, planning, or any other land usage regulations[1] was dramatically emphasized by the proposed aluminum plant at Trenton: only a negative vote on a loan guarantee under the Municipal Industrial and Recreational Obligations Act[2] prevented the construction of the installation there.

The Special Session of the 104th Legislature (January 1970) passed a Site Selection Bill[3] giving the Environmental Improvement Commission broad authority to regulate all land development projects which may substantially affect the environment. The conservation aspects of this legislation are apparent. What is not so obvious is problems which will be encountered in its implementation.

We are indebted to two practicing attorneys for highlighting what will be some of the problems in this law. The critique is in the form of a letter which might be sent to a typical client. Beyond the problems suggested in the "letter" which follows, the Site Selection Act suffers from a major problem discussed generally in Chapter Six: There is no provision for planning, comprehensive or otherwise. This creates

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* Louis A. Wood, member of Verrill, Dana, Philbrick, Whitehouse and Putnam, and Peter G. Rich, member of Linnell, Perkins, Thompson, Hinckley and Thaxter.

1. See Chapter Six, this volume.

2. 30 M.R.S.A. 5325-5343 (Supp.). See also Vol. I, p.35.

3. 38 M.R.S.A. 481-488 as added by P.L. 1969, c.571.

at least two problems:

1. Each application to the EIC must be treated ad hoc, unrelated to any pattern of development. For example, it would seem that a heavy industry proposed for a purely residential and recreational area would have to be approved if it met the criteria of financial capacity; traffic movement up to public roads; [no direct] adverse affect on the environment; and suitable soil types.
2. The third criterion is so broadly worded (see text at end of this chapter) that highly indirect effects upon environment, existing property values, and the like, could be deemed a basis for refusing approval. But if the EIC attempts to implement this criterion fully, incorporating the full range of factors from the purely aesthetic to the economic, then there is more than a little risk that the lack of prior planning may create serious problems.

Further, if the Legislature seriously intended the third criterion to be applied as written, it is at least questionable whether the EIC -- a body chosen for competence in the field of pollution measurement and control -- is the appropriate agency. Perhaps the orientation of EIC is expected to shift to meet the new challenge.

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Open Letter From a Legislative Agent to his Client, a Developer of Business and Residential Properties

The letter concerns "AN ACT to Regulate Site Locations of Developments Substantially Affecting Environment", presently Sections 481, et seq., of Title 38 Maine Revised Statutes.

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5. Louis A. Wood and Peter G. Rich.

April 1, 1970

Mr. Jack Armstrong
All American Builders, Inc.
Pownal, Maine

Dear Jack:

I know I promised to give you a report on that site location bill right after the Special Session of the Legislature in February, but frankly, I have been embarrassed to tell you how broad its application is. The bill fairly flew through the Legislative halls and was signed by the Governor before most of us could explain what it really meant to the Legislators. Conservation is running high, wide and handsome; I am sure none of us could have toned it down anyhow. Usually we get a look at a bill before it is thrown into the Legislative hopper, but not this one; it was really kept under wraps.

At any rate, let me tell you about the site location law. It becomes effective May 9, 1970. This effective date is what really forced me to sit down and write you this letter, although it is really painful, because most everything you do from now on will have to be cleared through the Environmental Improvement Commission. Remember that development you were involved in in Portland recently when you had to go before the Planning Board, the City Council, the Zoning Board of Appeals, the Harbor Commissioners, the WetlandsControl Board and the U. S. Army Corps of Engineers? -- well, if it had been this year you would also have to see the Environmental Improvement Commission which would consider the same matters as those other boards considered.

Section 481, the preamble of the Act, sets the stage for what follows:

> §481. Findings and purpose
>
> The Legislature finds that the economic and social wellbeing of the citizens of the State of Maine depend upon the location of commercial and industrial developments with respect to the natural environment of the State; that many developments because of their size and nature are capable of causing irreparable damage to the people and the environment in their surroundings; that the location of such developments is too important to be left only to the determination of the owners of such developments; and that discretion must be vested in state authority to regulate the location of developments which may substantially affect environment.

As a general proposition, not many people could argue with this statement of purpose. The preamble goes on to say that the State, acting through the Environmental Improvement Commission, may exercise the police power of the State "to control the location of those developments substantially affecting local environment in order to insure that such development will

be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings."

A. Developments Covered

Under Section 482 of the law a "development which may substantially affect environment" is defined, and this particular definition is crucial to the application of the law. Let me break the definition into the four separate categories that are treated. A "development which may substantially affect environment" is any commercial or industrial development which:

1. requires a license from the Environmental Improvement Commission; or
2. occupies a land area in excess of twenty (20) acres; or
3. contemplates drilling for or excavating natural resources, excluding certain types of gravel pits or pits of less than five (5) acres; or
4. occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

1. Requires a License From EIC

In connection with the first definition of such a development, at this time only the industrial or commercial developments which require a license to discharge waste into the waters of this State are brought within the application of the Act. Later on when the Commission establishes ambient and emission air standards, as well as designates air regions, an applicant for a license for an additional air contamination source will also be subject to the proof with respect to site location required by this Act, no matter how small or innocuous his project is.

2. Occupies Land Area Over 20 Acres

The second definition is going to cause you a real problem because most of your land developments, business or residential, cover at least twenty (20) acres of land.

3. Drilling or Excavating Natural Resources

The third definition is not going to both your operation any. But its interesting that the Legislature just got through setting up a Mining Commission, one of whose functions is to protect the environment.

4. Structures Covering 60,000 Sq.Ft. of Ground

The fourth definition will cause you as much of a problem as the second definition. Most any moderately sized shopping center or housing development (be it for apartments or single residences) will have over 60,000 square feet of ground area covered by buildings.

B. Requirements For Approval

Now that you know what a development is, let me tell you what you have to prove to the EIC. The Act in Section 484 requires that any person intending to construct or operate a development which may substantially affect local environment shall first apply to the EIC. The EIC may initiall

approve the application without hearing, but it may call a hearing and "The Commission shall approve a proposal whenever it finds that"

"1. Financial capacity. The proposed development has the financial capacity and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies.

"2. Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.

"3. No adverse affect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.

"4. Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking."

As you can see, you are going to have your hands full to make the proof required by the Act, and the Act states that the burden of proof shall be on the applicant. The Act also says that the Commission shall have a complete verbatim transcript kept of all hearings. This is important since the procedure for appeal states that a dissatisfied applicant may appeal directly to the Supreme Judicial Court where the hearing shall be on the record only, and the Court shall decide whether the Commission acted legally and within the scope of its authority and whether the order is supported by substantial evidence.

C. Problems of Developers

Many people, myself included, thought the Act would only apply to large industrial sites with smoke pouring forth and open sewage and waste flowing into the neighborhood trout pond. Certainly the Act covers much more ground; moderate sized housing developments, shopping centers, truck terminals, warehouses, good sized office or apartment buildings, and moderate sized business developments will be included because they are either situated on a parcel of land containing over twenty (20) acres or having over 60,000 square feet of ground area covered by structures. By the way, you are a Director of the local municipal development commission, and all that vacant land the commission hopes to sell certainly looks like a "development" to me. Even though there's been some land sold, what's left is over twenty acres. You had better tell your fellow directors they should apply to the EIC before they spend any more money on streets or utilities in the industrial park or buy any more land to add to it. I don't see how any prospective developer, private or public, whether he now owns land or proposes to buy land, can afford to disregard this Act.

Obviously you can see that some developers, for instance your local development commission, cannot possibly foresee what the exact business or industry will be at some later time, but it would be ridiculous to buy the land and improve it now if the EIC were to say at some later date that it objected. It seems to me that prospective developers and land purchasers are going to have to go to the EIC to get preliminary approval and then later on go back to require their purchasers to go back to the EIC to get approval of specific land uses. It seems that the EIC has authority to give such preliminary approvals because the Act in Section 484 allows orders subject to conditions deemed advisable by the EIC. Should you make the mistake of beginning construction or operation of a development without first notifying the Commission, they may order you to cease work; and further, after hearing, they may order you "to restore the area affected by such construction or operation to its condition prior thereto or as near as may be, to the satisfaction of the Commission." Obviously, Jack, you'd better notify the Commission.

D. Projects Affected

Section 488 attempts to define the applicability of the Act and provides in effect that the Act will not apply to any development:

1. in existence or in possession of applicable State or local licenses or under construction on January 1, 1970; or
2. the construction and operation of which has been specifically authorized by the Legislature prior to May 9, 1970; or
3. to public service corporation transmission lines.

There is a real problem as to those projects which have commenced construction after January 1, 1970 or have not obtained applicable State or local licenses prior to that date; but as you can see, there appears to be no problem with a project which was in existence and operation or has State or local licenses prior to January 1, 1970. I've heard it said the Act is unconstitutional because of retroactive effect; in good conscience, I can't suggest this to you because I think all the applicability section does is to grant some exemptions; it doesn't seem to make the Act effective earlier than the date all general legislation becomes effective, that is, May 9, 1970.

GENERAL

After you receive this letter, I imagine you will be calling me, and we can discuss this further. As I pointed out to you earlier, it seems the better part of valor to make application to the EIC in just about all your pending developments, whether you have a prospective tenant or not, since the Act is so broad.

One last word about the EIC. I am sure you realize that this is composed of a ten-member board with two members each from manufacturing interests, municipal government, the public generally, persons knowledgeable in matters relating to air pollution, and the conservation interests.

I should tell you that a quorum for meetings of the EIC is just three members. I would hope that we could get nearly all ten commissioners when your developments come up for hearing; I certainly wouldn't want your development judged by a small number of commissioners who might not understand all your problems.

It also appears to me that the EIC is going to be about the busiest Commission in State Government this next year what with all of the development that is supposedly coming into the State after years of encouragement by the DED. I am wondering whether the EIC can hold all the hearings, hire all the investigative personnel, do all the necessary travelling, print up all the necessary verbatim records and live within its Legislative budget of $20,000.00 for the year. Perhaps the EIC can use other moneys appropriated by the Legislature for its water and air pollution activities.

I recommend that we sit down and go over all of your current and proposed developments and make a decision as to when and how we apply. Since the EIC has not formulated any rules and regulations, it is hard to tell which direction they will take. The EIC is a fairminded group of individuals, as you know, and I would expect them to come out with reasonable rules and regulations at an early date. Meanwhile, we are somewhat up in the air.

Of course, if this site location act doesn't work out in practice, to everyone's satisfaction, the Legislature meets again in 1971. I hope I can do a better job for you next time.

Sincerely yours,

August A. House, III, Esq.

Enclosure: Copy of Site Location Act

Sec. 2. R. S., T. 38, c. 3, sub-c. I, Art. 6, additional. Subchapter I of chapter 3 of Title 38 of the Revised Statutes, as amended, is further amended by adding a new Article 6, to read as follows:

ARTICLE 6. SITE LOCATION OF DEVELOPMENT

§ 481. Findings and purpose

The Legislature finds that the economic and social wellbeing of the citizens of the State of Maine depend upon the location of commercial and industrial developments with respect to the natural environment of the State; that many developments because of their size and nature are capable of causing irreparable damage to the people and the environment in their surroundings; that the location of such developments is too important to be left only to the determination of the owners of such developments; and that discretion must be vested in state authority to regulate the location of developments which may substantially affect environment.

The purpose of this subchapter is to provide a flexible and practical means by which the State, acting through the Environmental Improvement Commission, in consultation with appropriate state agencies, may exercise the police power of the State to control the location of those developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings.

§ 482. Definitions

As used in this subchapter:

1. Commission. "Commission" means the Environmental Improvement Commission.

2. Development which may substantially affect environment. "Development which may substantially affect environment" means any commercial or industrial development which requires a license from the Environmental Improvement Commission, or which occupies a land area in excess of 20 acres, or which contemplates drilling for or excavating natural resources, excluding borrow pits for sand, fill or gravel, regulated by the State Highway Commission and pits of less than 5 acres, or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

3. Natural environment of a locality. "Natural environment of a locality" includes the character, quality and uses of land, air and waters in the area likely to be affected by such development, and the degree to which such land, air and waters are free from non-naturally occurring contamination.

4. Person. "Person" means any person, firm, corporation or other legal entity.

§ 483. Notification required

Any person intending to construct or operate a development which may substantially affect local environment shall, before commencing construction or operation, notify the commission in writing of his intent and of the nature and location of such development. The commission shall within 14 days of receipt of such notification, either approve the proposed location or schedule a hearing thereon in the manner hereinafter provided.

§ 484. Hearings; orders; construction suspended

In the event that the commission determines to hold a hearing on a notification submitted to it pursuant to section 483, it shall hold such hearing within 30 days of such determination, and shall cause notice of the date, time and place thereof to be given to the person intending the development and in addition shall give public notice thereof by causing such notice to be published in some newspaper of general circulation in the proposed locality, or if none, in the state paper; the date of the first publication to be at least 10, and the last publication to be at least 3, days before the date of the hearing.

At such hearing the commission shall solicit and receive testimony to determine whether such development will in fact substantially affect the environment or pose a threat to the public's health, safety or general welfare.

The commission shall approve a development proposal whenever it finds that:

1. Financial capacity. The proposed development has the financial capacity and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies.

2. Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.

3. No adverse affect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.

4. Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking.

At hearings held under this section the burden shall be upon the person proposing the development to affirmatively demonstrate to the commission that each of the criteria for approval listed in the preceding paragraphs have been met, and that the public's health, safety and general welfare will be adequately protected.

The commission shall adopt, and may amend and repeal rules for the conduct of hearings held under this section in the same manner as provided for the adoption, amendment and repeal of rules of practice before it. A complete verbatim transcript shall be made of all hearings held pursuant to this section.

Within 45 days after the commission adjourns any hearing held under this section, it shall make findings of fact and issue an order granting or denying permission to the person proposing such development to construct or operate the same as proposed, or granting such permission upon such terms and conditions as the commission may deem advisable to protect and preserve the environment and the public's health, safety and general welfare.

Any person who has notified the commission, pursuant to section 483, of his intent to create a development substantially affecting local environment shall, upon receipt of notice that the commission has determined to hold a hearing under this section, immediately defer or suspend construction or operation with respect to such development until the commission has issued its order after such hearing.

§ 485. Failure to notify commission; hearing; injunctions; orders

The commission may at any time with respect to any person who has commenced construction or operation of any development without having first notified the commission pursuant to section 483, schedule and conduct a public hearing in the manner provided by section 484 with respect to such development.

The commission may request the Attorney General to enjoin any person, who has commenced construction or operation of any development without having first notified the commission pursuant to section 483, from further construction or operation pending such hearing and order. Within 30 days of such request the Attorney General shall bring an appropriate civil action.

In the event that the commission shall issue an order, denying a person commencing construction or operation of any development without first having notified the commission pursuant to section 483, permission to continue such construction or operation, it may further order such person to restore the area affected by such constuction or operation to its condition prior thereto or as near as may be, to the satisfaction of the commission.

§ 486. Enforcement

All orders issued by the commission under this subchapter shall be enforced by the Attorney General. If compliance with any order of the commission is not had within the time period therein specified, the commission shall immediately notify the Attorney General of this fact. Within 30 days thereafter the Attorney General shall bring an appropriate civil action designed to secure compliance with such order.

§ 487. Judicial review

Any person, with respect to whose development the commission has issued an order after hearing pursuant to section 484 may within 30 days after notice of such order, appeal therefrom to the Supreme Judicial Court. Notice of such appeal shall be given by the appellant to the commission. The proceedings shall not be de novo. Review shall be limited to the record of the hearing before and the order of the commission. The court shall decide whether the commission acted regularly and within the scope of its authority, and whether the order is supported by substantial evidence, and on the basis of such decision may enter judgment affirming or nullifying such determination.

§ 488. Applicability

This subchapter shall not apply to any development in existence or in possession of applicable state or local licenses to operate or under construction on January 1, 1970 or to any development the construction and operation of which has been specifically authorized by the Legislature prior to the effective date hereof, or to public service corporation transmission lines.

Sec. 3. Appropriation. There is appropriated from the General Fund the sum of $20,000 to the Environmental Improvement Commission to carry out the purposes of this Act. Any unexpended balance at the end of June 30, 1970 shall be carried forward to June 30, 1971. The breakdown shall be as follows:

	1969-70
ENVIRONMENTAL IMPROVEMENT COMMISSION	
Personal Services	$ 4,000
All Other	16,000
	$20,000

Effective May 9, 1970

Chapter 572

AN ACT Relating to Coastal Conveyance of Petroleum.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., T. 38, c. 3, sub-c. II-A, additional. Chapter 3 of Title 38 of the Revised Statutes is amended by adding a new subchapter II-A, to read as follows:

SUBCHAPTER II-A

OIL DISCHARGE PREVENTION AND POLLUTION CONTROL

§ 541. Findings; purpose

The Legislature finds and declares that the highest and best uses of the seacoast of the State are as a source of public and private recreation and solace from the pressures of an industrialized society, and as a source of public use and private commerce in fishing, lobstering and gathering other marine life used and useful in food production and other commercial activities.

The Legislature further finds and declares that the preservation of these uses is a matter of the highest urgency and priority and that such uses can only be served effectively by maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests with the least possible conflicts in such diverse uses.

The Legislature further finds and declares that the transfer of oil, petroleum products and their by-products between vessels and vessels and onshore facilities and vessels within the jurisdiction of the State and state waters is a hazardous undertaking; that spills, discharges and escape of oil, petroleum products and their by-products occurring as a result of procedures involved in the transfer and storage of such products pose threats of great danger and damage to the marine, estuarine and adjacent terrestrial environment of the State; to owners and users of shorefront property; to public and private recreation; to citizens of the State and other interests deriving livelihood from marine-related activities; and to the beauty of the Maine coast; that such hazards have frequently occurred in the past, are occurring now and present future threats of potentially catastrophic proportions, all of which are expressly declared to be inimical to the paramount interests of the State as herein set forth and that such state interests outweigh any economic burdens imposed by the Legislature upon those engaged in transferring oil, petroleum products and their by-products and related activities.

The Legislature intends by the enactment of this legislation to exercise the police power of the State through the Environmental Improvement Commission by conferring upon said commission the exclusive power to deal with the hazards and threats of danger and damage posed by such transfers and related activities; to require the prompt containment and removal of pollution occasioned thereby; to provide procedures whereby persons suffering damage from such occurrences may be promptly made whole; and to establish a fund to provide for the inspection and supervision of such activities and guarantee the prompt payment of reasonable damage claims resulting therefrom.

The Legislature further finds and declares that the preservation of the public uses referred to herein is of grave public interest and concern to the State in promoting its general welfare, preventing disease, promoting health and providing for the public safety, and that the State's interest in such preservation outweighs any burdens of absolute liability imposed by the Legislature upon those engaged in transferring oil, petroleum products and their by-products and related activities.

§ 542. Definitions

The following words and phrases as used in this subchapter shall, unless a different meaning is plainly required by the context, have the following meaning:

1. Barrel. "Barrel" shall mean 42 U.S. gallons at 60 degrees Fahrenheit.

2. Board. "Board" shall mean the Board of Arbitration.

3. Commission. "Commission" shall mean the Environmental Improvement Commission.

4. Discharge. "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

5. Fund. "Fund" shall mean the Maine Coastal Protection Fund.

6. Oil. "Oil, petroleum products and their by-products" means oil of any kind and in any form including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with other wastes, crude oils and all other liquid hydrocarbons regardless of specific gravity.

7. Oil terminal facility. "Oil terminal facility" means any facility of any kind and related appurtenances, located in, on or under the surface of any land or water, including submerged lands, which is used or capable of being used for the purpose of transferring, processing or refining oil, petroleum products and their by-products, or for the purpose of storing the same, but does not include any facility used or capable of being used to store no more than 500 barrels, nor any facility not engaged in the transfer of oil, petroleum products or their by-products to or from tidal waters of the State. A vessel shall be considered an oil terminal facility only in the event of a ship to ship transfer of oil, petroleum products and their by-products, and only that vessel going to or coming from the place of transfer and the oil terminal facility.

8. Operate or operator. "Operate or operator" shall mean any person owning or operating an oil terminal facility whether by lease, contract or any other form of agreement.

9. Person. "Person" shall mean individual, partnership, joint venture, corporation or any group of the foregoing organized or united for a business purpose.

10. Transferred. "Transferred" shall include both onloading and offloading between terminal and vessel and vessel to vessel.

11. Vessel. "Vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise and shall include barges and tugs.

§ 543. Pollution and corruption of waters and lands of the State prohibited

The discharge of oil, petroleum products or their by-products into or upon any coastal waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the State, or into any river, stream, sewer, surface water drain or other waters that drain into the coastal waters of the State is prohibited.

§ 544. Powers and duties of the commission

The powers and duties conferred by this subchapter shall be exercised by the Environmental Improvement Commission and shall be deemed to be an essential governmental function in the exercise of the police power of the State.

1. Jurisdiction. The powers and duties of the commission under this subchapter shall extend to the areas described in section 543 and to a distance of 12 miles from the coastline of the State.

2. Licenses. Licenses required under this subchapter shall be secured from the commission subject to such terms and conditions as are set forth in this subchapter.

§ 545. Operation without license prohibited

No person shall operate or cause to be operated an oil terminal facility as defined in this subchapter without a license.

1. Expiration of licenses. Licenses shall be issued on an annual basis and shall expire on December 31st annually, subject to such terms and conditions as the commission may determine are necessary to carry out the purposes of this subchapter.

2. Renewal of licenses. As a condition precedent to the issuance or renewal of a license the commission shall require satisfactory evidence that the applicant has or is in the process of implementing state and federal plans and regulations for control of pollution related to oil, petroleum products and their by-products and the abatement thereof when a discharge occurs.

3. Exemptions. The Legislature finds and declares that the likelihood of significant damage to marine, estuarine and terrestrial environment, due to spills of oil, petroleum products and their by-products by the following classes of persons, is remote due to the limited nature of their operations and the small quantities stored, and accordingly exempts the same from the licensing requirements imposed by this section:

A. Marinas. Persons engaged in the business of servicing the fuel requirements of pleasure craft, fishing boats and other commercial vessels, where the purchaser and the consumer are the same entity and the serviced vessel is 75 feet or less in overall length.

4. Certain vessels included. Licenses issued to any terminal facility shall include vessels used to transport oil, petroleum products and their by-products between the facility and vessels within state waters.

§ 546. Regulatory powers of commission

The commission shall from time to time adopt, amend, repeal and enforce reasonable rules and regulations necessary to carry out the intent of this subchapter.

1. Procedure for adopting rules and regulations. The commission shall post notice of proposed rules and regulations by publishing an attested copy of such notice in the state paper, and such other daily papers published in the State as it believes will bring the proposals to the attention of all interested parties, at least 7 days prior to holding a public hearing.

A. Such notice shall in addition contain the time, date and place of the public hearing.

B. The commission may establish reasonable rules and regulations governing the conduct of public hearings under this subchapter including adjournments and continuations thereof.

C. Rules and regulations adopted by the commission shall become effective 15 days after final adjournment of the public hearing.

D. Rules and regulations of the commission shall be seasonably printed and made available to interested parties.

2. Emergency rules and regulations without hearing. Upon finding by the commission that an emergency exists requiring immediate rules, regulations or orders to effectively deal with such emergency, the commission may without hearing adopt such rules and regulations and issue such orders which shall have the force and effect of law, but any rules, regulations or orders issued under authority of this subsection shall be null and void 30 days thereafter unless sooner adopted in accordance with subsection 1.

3. Enforcement of rules and regulations. Rules, regulations and orders issued by the commission under this subchapter shall have the force and effect of law.

4. Extent of regulatory powers. The commission shall have the power to adopt rules and regulations including but not limited to the following matters:

A. Operating and inspection requirements for facilities, vessels, personnel and other matters relating to licensee operations under this subchapter.

B. Procedures and methods of reporting discharges and other occurrences prohibited by this subchapter.

C. Procedures, methods, means and equipment to be used by persons subject to regulations by this subchapter.

D. Procedures, methods, means and equipment to be used in the removal of oil and petroleum pollutants.

E. Development and implementation of criteria and plans to meet oil and petroleum pollution occurrences of various degrees and kinds.

F. The establishment from time to time of control districts comprising sections of the Maine coast and the establishment of rules and regulations to meet the particular requirements of each such district.

G. Requirements for the safety and operation of vessels, barges, tugs, motor vehicles, motorized equipment and other equipment relating to the use and operation of terminals, facilities and refineries and the approach and departure from terminals, facilities and refineries.

H. Such other rules and regulations as the exigencies of any condition may require or such as may reasonably be necessary to carry out the intent of this subchapter.

§ 547. Emergency proclamation; Governor's powers

Whenever any disaster or catastrophe exists or appears imminent arising from the discharge of oil, petroleum products or their by-products, the Governor shall by proclamation declare the fact and that an emergency exists in any or all sections of the State. If the Governor is temporarily absent from the State or is otherwise unavailable, the next person in the State who would act as Governor if the office of Governor were vacant shall, by proclamation, declare the fact and that an emergency exists in any or all sections of the State. A copy of such proclamation shall be filed with the Secretary of State. The Governor shall have general direction and control of the Environmental Improvement Commission and shall be responsible for carrying out the purposes of this subchapter.

In performing his duties under this subchapter, the Governor is authorized and directed to cooperate with all departments and agencies of the Federal Government, with the offices and agencies of other states and foreign countries, and the political subdivisions thereof, and with private agencies in all matters pertaining to a disaster or catastrophe.

In performing his duties under this subchapter, the Governor is further authorized and empowered:

1. Orders, rules and regulations. To make, amend and rescind the necessary orders, rules and regulations to carry out this subchapter within the limits of the authority conferred upon him and not inconsistent with the rules, regulations and directives of the President of the United States or of any federal department or agency having specifically authorized emergency functions.

2. Delegation of authority. To delegate any authority vested in him under this subchapter, and to provide for the subdelegation of any such authority.

Whenever the Governor is satisfied that an emergency no longer exists, he shall terminate the proclamation by another proclamation affecting the sections of the State covered by the original proclamation, or any part thereof. Said proclamation shall be published in such newspapers of the State and posted in such places as the Governor, or the person acting in that capacity, deems appropriate.

3. Civil defense. The provisions of Title 25, chapter 61, as they shall apply to eminent domain and compensation, mutual aid, immunity, aid in emergency, right of way, enforcement and compensation shall apply to disasters or catastrophes proclaimed by the Governor under this subchapter.

§ 548. Removal of prohibited discharges

Any person discharging oil, petroleum products or their by-products in the manner prohibited by section 543 shall immediately undertake to remove such discharge to the commission's satisfaction. Notwithstanding the above requirement the commission may undertake the removal of such discharge and may retain agents and contracts for such purposes who shall operate under the direction of the commission.

Any unexplained discharge of oil, petroleum products or their by-products within state jurisdiction or discharge of oil, petroleum products or their by-products occurring in waters beyond state jurisdiction that for any reason penetrates within state jurisdiction shall be removed by or under the direction of the commission. Any expenses involved in the removal of discharges, whether by the person causing the same, the person reporting the same or the commission by itself or through its agents or contractors shall be paid in the first instance from the Maine Coastal Protection Fund hereinafter provided for and any reimbursements due said fund shall be collected in accordance with the provisions of section 551.

§ 549. Personnel and equipment

The commission shall establish and maintain at such ports within the State, and other places as it shall determine, such employees and equipment as in its judgment may be necessary to carry out the provisions of this subchapter. The commission may employ, subject to the Personnel Law, and prescribe the duties of such employees. The salaries of such employees and the cost of such equipment shall be paid from the Maine Coastal Protection Fund established by this subchapter. The commission and the Maine Mining Bureau shall periodically consult with each other relative to procedures for the prevention of oil discharges into the coastal waters of the State from offshore drilling production facilities. Inspection and enforcement employees of the commission in their line of duty under this subchapter shall have the powers of a constable.

§ 550. Enforcement, penalties

Whenever it appears after investigation that there is a violation of any rule, regulation, order or license issued by the commission, the commission shall proceed in accordance with the provisions of section 451, subsection 2.

Whoever violates any provisions of this subchapter or any rule, regulation or order of the commission made hereunder shall be punished by a fine of not less than $100 nor more than $5000. Each day that any violation shall continue shall constitute a separate offense. The provisions of this section shall not apply to any discharge promptly reported and removed by a licensee in accordance with the rules, regulations and orders of the commission.

§ 551. Maine Coastal Protection Fund

The Maine Coastal Protection Fund is established to be used by the commission as a nonlapsing, revolving fund for carrying out the purposes of this subchapter. The fund shall be limited to the sum of $4,000,000. To this sum shall be credited all license fees, penalties and other fees and charges related to this subchapter, and to this fund shall be charged any and all expenses of the commission related to this subchapter, including administrative expenses, costs of removal of discharges of pollutants, and third party damages covered by this subchapter.

Moneys in the fund, not needed currently to meet the obligations of the commission in the exercise of its responsibilities under this subchapter shall be deposited with the Treasurer of State to the credit of the fund, and may be invested in such manner as is provided for by statute. Interest received on such investment shall be credited to the Maine Coastal Protection Fund.

1. Research and development. The Legislature may allocate not more than $100,000 per annum of the amount then currently in the fund to be devoted to research and development in the causes, effects and removal of pollution caused by oil, petroleum products and their by-products on the marine environment. Such allocations shall be made in accordance with the provisions of section 555.

2. Third party damages. Any person claiming to have suffered damages to real estate or personal property or loss of income directly or indirectly as a result of a discharge of oil, petroleum products or their by-products prohibited by section 543 may apply within 6 months after the occurrence of such discharge to the commission stating the amount of damage he claims to have suffered as a result of such discharge. The commission shall prescribe appropriate forms and details for such applications. The commission may, upon petition, and for good cause shown, waive the 6 months limitation for filing damage claims.

A. If the claimant, the commission and the person causing the discharge can agree to the damage claim, the commission shall certify the amount of the claim and the name of the claimant to the Treasurer of State and the Treasurer of State shall pay the same from the Maine Coastal Petroleum Fund.

B. If the claimant, the commission and the person causing the discharge cannot agree as to the amount of the damage claim, the claim shall forthwith be transmitted for action to the Board of Arbitration as provided in this subchapter.

C. Third party damage claims shall be stated in their entirety in one application. Damages omitted from any claim at the time the award is made shall be deemed waived.

D. Damage claims arising under the provisions of this subchapter shall be recoverable only in the manner provided under this subchapter, it being the intent of the Legislature that the remedies provided in this subchapter are exclusive.

3. Board of Arbitration. The Board of Arbitration shall consist of 3 persons, one to be chosen by the person determined in the first instance by the commission to have caused the discharge, one to be chosen by the commission to represent the public interest and one person chosen by the first 2 appointed members to serve as a neutral arbitrator. The neutral arbitrator shall serve as chairman. If the 2 arbitrators fail to agree upon, select and name the neutral arbitrator within 10 days after their appointment then the commission shall request the American Arbitration Association to utilize its procedures for the selection of the neutral arbitrator.

A. No member of the commission shall serve as an arbitrator.

B. Arbitrators shall be named by their principals within 10 days after the commission receives notice of claims arising from a discharge prohibited by section 543. If either party shall fail to select its arbitrator within the said 10 days the other party shall request the American Arbitration Association to utilize its procedures for the selection of such arbitrator and the 2 arbitrators shall proceed to select the neutral arbitrator as provided in this section.

C. One Board of Arbitrators shall be established for and hear and determine all claims arising from or related to a common single discharge.

D. Hearings before Boards of Arbitrators shall be informal, and the rules of evidence prevailing in judicial proceedings shall not be binding. The board shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of books, records and other evidence relative or pertinent to the issues represented to them for determination.

E. Determinations made by a majority of the board shall be final, and such determinations may be subject to review by a Justice of the Superior Court but only as to matters relating to abuse of discretion by the board.

F. Representation on the Board of Arbitration shall not be deemed an admission of liability for the discharge.

4. Funding.

A. Annual license fees shall be determined on the basis of ½ cent per barrel of oil, petroleum products or their by-products transferred by the applicant during the licensing period and shall be paid monthly on the basis of records certified to the commission. License fees shall be paid to the commission and upon receipt by it credited to the Maine Coastal Protection Fund.

B. Whenever the balance in the fund has reached the limit provided under this subchapter license fees shall be proportionately reduced to cover only administrative expenses and sums allocated to research and development.

5. Disbursements from fund. Moneys in the Maine Coastal Protection Fund shall be disbursed for the following purposes and no others:

A. Administrative expenses, personnel expenses and equipment costs of the commission related to the enforcement of this subchapter.

B. All costs involved in the abatement of pollution related to the discharge of oil, petroleum products and their by-products covered by this subchapter.

C. Sums allocated to research and development in accordance with this section.

D. Payment of 3rd party claims awarded in accordance with this section.

E. Payment of costs of arbitration and arbitrators.

F. Payment of costs of insurance by the State to extend or implement the benefits of the fund.

6. Reimbursements to Maine Coastal Protection Fund. The commission shall recover to the use of the fund all sums expended therefrom, including overdrafts, for the following purposes; provided that recoveries resulting from damage due to an oil pollution disaster declared by the Governor pursuant to section 547 shall be apportioned between the Maine Coastal Protection Fund and the General Fund so as to repay the full costs to the General Fund of any bonds issued as a result of such disaster.

A. Costs incurred by the fund in the abatement of a prohibited discharge including 3rd party claims when the person permitting the same shall have failed to promptly report the discharge as required by rules and regulations of the commission, and such costs where the person permitting the prohibited discharge is not a licensee.

B. In the case of a licensee promptly reporting a discharge as required by this article, costs involved in the abatement of any single prohibited discharge including 3rd party claims in excess of $15,000, over and above payments received under any federal program.

C. Requests for reimbursement to the fund for the above costs if not paid within 30 days of demand shall be turned over to the Attorney General for collection.

7. Waiver of reimbursement. Upon petition of the person determined to be liable for reimbursement to the fund for abatement costs under subsection 6, the commission may, after hearing, waive the right to reimbursement to the fund if the commission finds that the occurrence was the result of any of the following:

A. An act of war.

B. An act of government, either State, Federal or municipal.

C. An act of God, which shall mean an unforseeable act exclusively occasioned by the violence of nature without the interference of any human agency.

Upon such finding by the commission immediate credit therefor shall be entered for the party involved. The findings of the commission shall be conclusive as it is the legislative intent that waiver provided in this subsection is a privilege conferred not a right granted.

§ 552. Liabilities of licensees

1. Licensee shall be liable. A licensee shall be liable for all acts and omissions of its servants and agents, and carriers destined for the licensee's facilities from the time such carrier shall enter state waters until such time as the carrier shall leave state waters.

2. State need not plead or prove negligence. Because it is the intent of this subchapter to provide the means for rapid and effective clean-up and to minimize direct damages as well as indirect damages and the proliferation of 3rd party claims, any licensee, agent or servant including carriers destined for or leaving a licensee's facility while within state waters permits or suffers a prohibited discharge or other polluting condition to take place shall be liable to the State of Maine for all costs of clean-up or other damage incurred by the State. In any suit to enforce claims of the State under this section, it shall not be necessary for the State to plead or prove negligence in any form or manner on the part of the licensee, the State need only plead and prove the fact of the prohibited discharge or other polluting condition and that it occurred at facilities under the control of the licensee or was attributable to carriers or others for whom the licensee is responsible as provided in this subchapter.

§ 553. Interstate Compact, authority

In accordance with subchapter II the Governor of this State is authorized and directed to execute supplementary agreements with any one or more of the states comprising the New England Interstate Water Pollution Control Commission and the United States for the purpose of implementing and carrying out the provisions, limitations, qualifications and intent of this subchapter.

§ 554. Reports to the Legislature

The commission shall include in its recommendations to each Legislature as required by section 361 specific recommendations relating to the operation of this subchapter, specifically including a license fee formula to reflect individual licensee experience, and fee schedule based upon volatility and toxicity of petroleum products and their by-products.

§ 555. Budget approval

The commission shall submit to each Legislature its budget recommendations for disbursements from the fund in accordance with the provisions of section 551. Upon approval thereof the State Controller shall authorize expenditures therefrom as approved by the commission.

§ 556. Municipal ordinances; powers limited

Nothing in this subchapter shall be construed to deny any municipality, by ordinance or by law, from exercising police powers under any general or special act; provided, however, that ordinances and bylaws in furtherance of the intent of this subchapter and promoting the general welfare, public health and public safety shall be valid unless in direct conflict with the provisions of this subchapter or any rule, regulation or order of the commission adopted under authority of this subchapter.

§ 557. Construction

This subchapter, being necessary for the general welfare, the public health and the public safety of the State and its inhabitants, shall be liberally construed to effect the purposes set forth under this subchapter. No rule, regulation or order of the commission shall be stayed pending appeal under the provisions of this subchapter.

Sec. 2. R. S., T. 38, § 416, amended. The first and 2nd sentences of the 3rd paragraph of section 416 of Title 38 of the Revised Statutes, as enacted by section 4 of chapter 431 of the public laws of 1969, are amended to read as follows:

There shall be no discharge of grease, oil, gasoline, kerosene or related products into the inland waters ~~or into he marginal sea~~ of this State. Any person, corporation or other party that discharges, or permits to be discharged, grease, oil, gasoline, kerosene and related products into the inland waters ~~or marginal sea~~ of this State shall remove same from said waters.

Sec. 3. Expenditures. Moneys not exceeding $800,000 which accrue to the fund prior to June 30, 1971 from legislative appropriations, license fees, penalties and other fees and charges related to this Act, may be expended by the commission for the purposes described in such legislation.

Sec. 4. Appropriation. There is appropriated from the General Fund the sum of $30,000 to carry out the purposes of this Act. The breakdown shall be as follows:

		1969-70
ENVIRONMENTAL IMPROVEMENT COMMISSION		
Personal Services	(2)	$20,000
All Other		10,000
		$30,000

Any unexpended balances remaining at June 30, 1970 shall carry to June 30, 1971.

Effective May 9, 1970

Chapter 570

AN ACT Prohibiting Dumping of Out-of-State Waste Matter.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, there is an increasing national demand for land areas to be used for the public and private dumping of waste matter; and

Whereas, there are large areas in the State of Maine which are of interest to other states, municipalities and private interests for use as dumping areas; and

Whereas, the use of Maine land as sites for the dumping of waste matter from out-of-state sources will greatly increase the levels of pollution in Maine soil and waters and threaten the health, safety and welfare of the people of the State of Maine; and

Whereas, the State of Maine is currently without express statutory authority to exclude such waste and other loathsome products as are being, and may be from time to time, brought into the State; and

Whereas, the passage of this Act will enhance the opportunity for the State of Maine to prevent said pollution, reduce said threat to the health, safety and welfare of the people of the State of Maine, and exclude said waste matter; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of the State of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine, as follows:

R. S., T. 17, § 2253, additional. Title 17 of the Revised Statutes is amended by adding a new section 2253, to read as follows:

§ 2253. Out-of-state waste matter

As used in this section, "waste matter" means garbage, refuse, solid or liquid waste, ashes, rubbish, industrial and commercial waste, and all other refuse of every description, whether loose, in containers, compacted, baled, bundled or otherwise.

No person, firm, corporation or other legal entity shall deposit, or cause or permit to be deposited, any waste matter in any structure or on any land within the State, which waste matter originated outside the State.

Nothing in this section shall be construed to prohibit the transportation of waste matter into the State for use as a raw material for the production of new commodities which are not waste matter as defined.

Whoever shall violate this section shall be punished by a fine of not less than $200 nor more than $2,000 for each violation. Each day that such violation continues or exists shall constitute a separate offense.

The Superior Court, upon complaint of the Attorney General, the municipal officers of any municipality, or any local or state health officer, shall have jurisdiction to restrain or enjoin violations of this section, and to enter decrees requiring the removal from the State of waste matter deposited in violation of this section. In any such civil proceeding neither an allegation nor proof of unavoidable or substantial and irreparable injury shall be required to obtain a temporary restraining order or injunction, nor shall bond be required of the plaintiff; and the burden of proof shall be on the defendant to show that the waste matter involved originated within the State.

The Legislature finding that waste matter of the nature hereinafter described poses no threat to the environment of this State, the provisions of this section shall not be construed to prohibit persons, firms, corporations and other legal entities now or previously depositing waste matter on property within the State owned on January 1, 1970 by them, which waste matter originates from property owned by them adjacent to the border of the State, from continuing to so deposit waste matter of the same nature as has been so deposited; except that this provision shall not apply to solid waste after December 31, 1971.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

Effective February 5, 1970

Chapter 571

AN ACT to Regulate Site Location of Development Substantially Affecting Environment.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., T. 38, § 361, amended. The 6th and 7th paragraphs of section 361 of Title 38 of the Revised Statutes, as amended by section 2 of chapter 475 of the public laws of 1967, are further amended to read as follows:

It shall be the duty of the commission, ~~to study, investigate and from time to time recommend to the persons responsible for the conditions, ways and means, so far as practicable and consistent with the public interest, of controlling~~ exercising the police power of the State, to control, abate and prevent the pollution of the air, ~~rivers~~ waters, ~~and~~ coastal flats and prevent diminution of the highest and best use of the natural environment of the State ~~by the deposit therein or thereon of municipal sewage, industrial waste and other substances and materials in so far as the same are detrimental to the public health or to animal, fish or aquatic life, or to the practicable and beneficial use of said air, rivers, waters and coastal flats~~. The commission shall make recommendations to each subsequent Legislature with respect to the classification of the ~~rivers~~ waters and coastal flats and sections thereof within the State, based upon reasonable standards of quality and use.

The commission shall make recommendations to each Legislature with respect to the control, abatement and prevention of pollution of the air, ~~rivers~~ waters, ~~and~~ coastal flats and ~~sections thereof~~ other aspects of the natural environment within the State ~~for the purpose of raising the classifications or standards thereof to the highest possible classification or standards so far as economically feasible, such recommendations to relate to methods, costs and the setting of time limits for compliance~~ for the benefit of the citizens of this State.