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SUBMERGED LANDS STUDY

Bureau of Public Lands/Department of Conservation

January 1989

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A STUDY OF SUBMERGED LAND LEASING POLICIES

**A Report to the Maine Legislature
as directed by P.L. 765, enacted 4/22/88**

**Prepared by
The Bureau of Public Lands/Maine Department of Conservation**

January 13, 1989

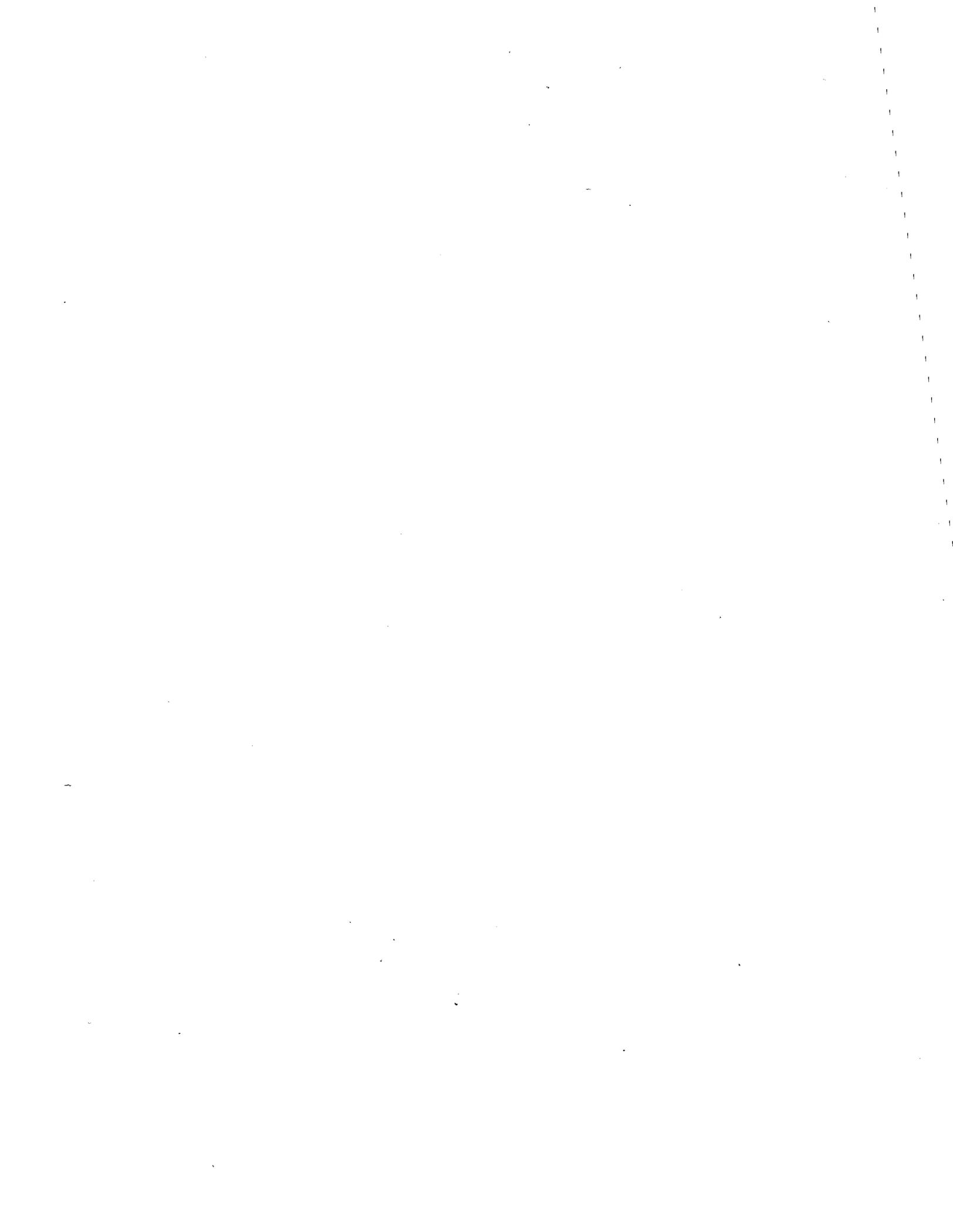
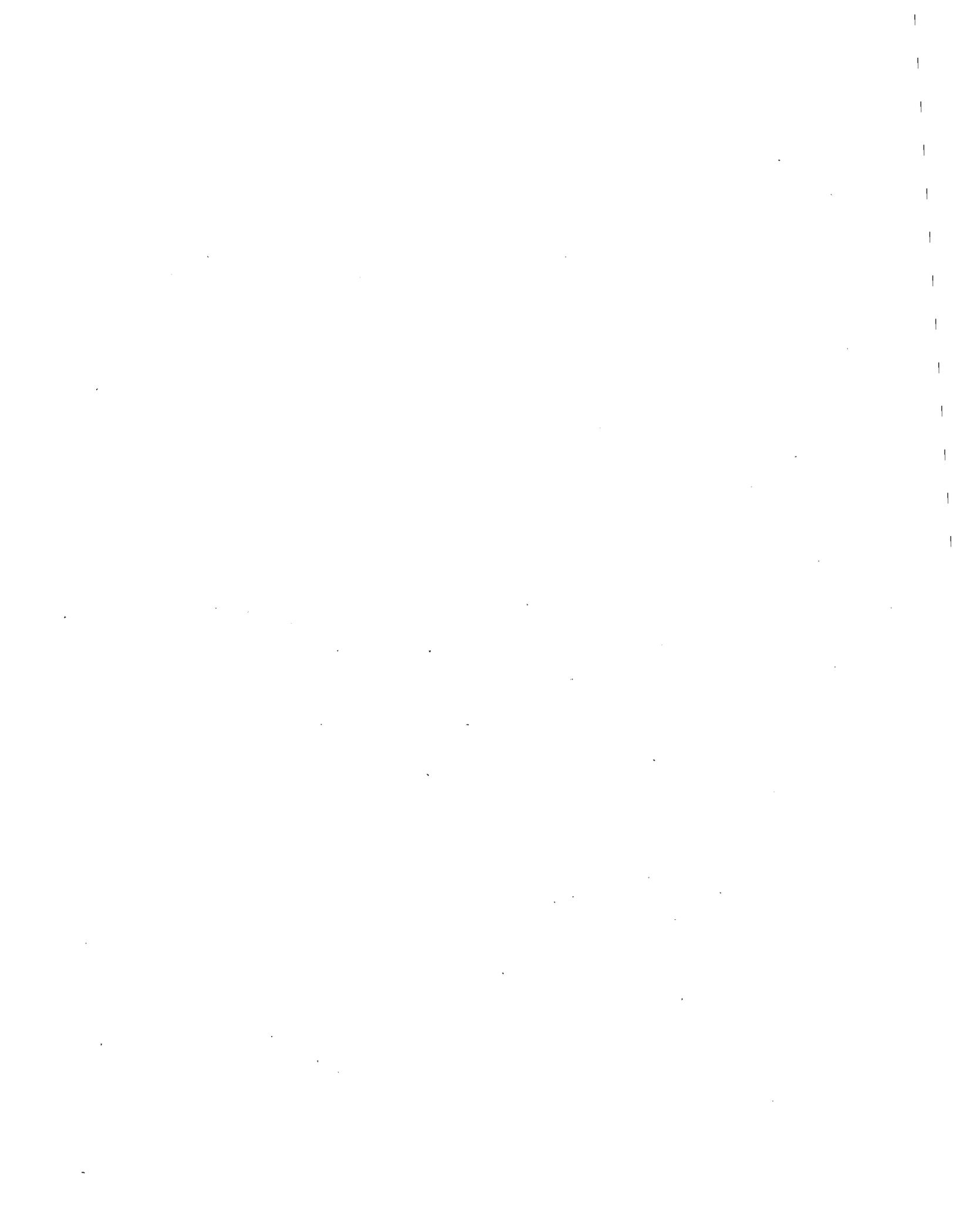


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EXECUTIVE SUMMARY

This report was prepared by the Bureau of Public Lands, Maine Department of Conservation, for the Maine Legislature as required by Public Law 765, "An Act to Prohibit the Establishment of Docking Condominiums on Tidewaters, Lakes, and Great Ponds."

The Bureau was assisted by the State Planning Office, the Department of Marine Resources, and an advisory committee of persons with interest and expertise in submerged land issues.

P.L. 765 required the Bureau to study four specific topics:

- A. The adequacy of current lease fee schedules to yield a fair rate of return for the State for the private use of submerged state lands;
- B. The impact of current leasing policies on public access to the waters of the State, including access by commercial and recreational users;
- C. The impact of current leasing policies on the commercial fishing industry, including the shore-based services and facilities on which this industry depends; and
- D. The desirability of the current trend towards what is commonly known as a dockominium, which is long-term subleasing of leases to multiple leaseholders.

In addition to these specific directives, the Bureau also studied several policy questions that are closely aligned to these topics.

Key Findings of the Study

*The Bureau of Public Lands has responsibility to provide stewardship and management of the state owned submerged lands and must implement policies that will ensure the protection of the public trust on those lands.

*Current lease fees do not return fair market value to the State, nor are they adequate to cover the cost of a submerged lands management program. Lease fees should be tied to the fair market value of the submerged land and structured to favor desirable, water dependent uses.

*Public access to and over submerged lands is the joint responsibility of several state and federal agencies and the local communities. These entities must cooperate to plan for and manage growth and development and to protect and enhance public access. Public access and other public benefits such as fish piers, boat ramps, and other facilities that are in keeping with the doctrine of public trust should be required as

conditions of submerged land leases. In the future, funds generated by the program may exceed program needs and may then be used to provide additional compensatory public benefits.

*The commercial fishing industry can be adversely affected by some types of coastal development and competing uses. New policies and statutory authority to deny leases are needed to ensure continued protection for the fishing industry and its supporting infrastructure.

*Marinas are an acceptable water dependent use of submerged lands. If adequately controlled to protect public interests, a dockminium style subleasing arrangement is an acceptable marina practice. However, the selling of slip space is not an acceptable practice. A new policy is proposed which encompasses all marinas and minimizes the negative aspects of dockminiums.

Key recommendations of the Study

*The Bureau of Public Lands should:

- adopt a new fee structure.
- adopt a new policy for marinas and dockminiums.
- inventory and register all existing structures under constructive easement.
- require public access or other public benefits as conditions of submerged land leases.
- add a position of submerged land coordinator to manage the program and interact with other state agencies and municipalities.
- continue to study submerged land issues and develop new policies in response to increasing and changing demands.

*The Department of Marine Resources should:

- Expand its role as a review agency to include impacts upon marine industry infrastructure.
- Add a position to facilitate review of marine industry infrastructure.

In addition, it is recommended that an interagency task force be assembled to consider how to protect marine industry infrastructure and how to integrate it into state leasing and permitting policies.

Implications for the Submerged Lands Program

If the proposals and recommendations of this study are adopted, the Bureau of Public Lands will be better able to fulfill its mandated responsibility as steward of the public trust on submerged lands. The Submerged Lands Management Program will become a major division of the Bureau of Public Lands with a full time coordinator and technician. If the proposed new lease fee system is adopted, the Bureau will, within a few years, generate

enough income to more effectively administer the Submerged Lands Program. This program will be better able to respond to the needs for reviewing permits, administering leases, monitoring lease compliance, and coordinating submerged land growth management and planning with other state agencies and local communities. This program will also face the major task of inventorying existing uses that are under constructive easement and preparing for the time when those users must obtain leases and begin paying the State of Maine fair market value for the publicly-owned submerged lands they occupy.

INTRODUCTION

This study of the Bureau of Public Lands' Submerged Lands Leasing Policy was mandated by Public Law 765, An Act to Prohibit the Establishment of Docking Condominiums on Tidewaters, Lakes, and Great Ponds, (enacted 4/22/88).

The Bureau of Public Lands was designated the lead agency in organizing the study and preparing this report. It was assisted by an inter-agency team that included the State Planning Office and the Department of Marine Resources. An Advisory Committee representing commercial fisheries, waterfront development, recreation, coastal protection, marine law, and the State Legislature was assembled to reflect an array of perspectives on the issues, provide guidance, and review the report.

Development pressure and conflicts among competing uses of Maine's coast and lakes have intensified in recent years. To help protect Maine's submerged land resources the Legislature enacted P.L. 765, which authorized this study and directed that this report focus on 4 major topics:

- "* The adequacy of current lease fee schedules to yield a fair rate of return to the State for the private use of submerged lands;
- * The impact of leasing policies on public access to the waters of the State, including access by commercial and recreational users;
- * The impact of current leasing policies on the commercial fishing industry, including the shore-based services and facilities on which this industry depends; and
- * The desirability of the current trend towards what is commonly known as a dockominium, which is long-term subleasing of leases to multiple leaseholders."

These 4 major concerns provide the focus for this report and are explored in detail in subsequent sections. For the sake of brevity they are referred to as Adequacy of Fees, Access, Commercial Fisheries & Industry, and Dockominiums.

In addition to these 4 topics, P.L. 765 also directed the Bureau to study "any other topics the Director determines to be important". Several related

issues and key public policy questions were identified over the course of the study and are included in this report. These include:

- address key public policy questions regarding submerged lands management;
- explain the current submerged lands program;
- define the submerged land responsibilities of other agencies and encourage improved coordination among them;
- provide guidance for expansion of the submerged lands program to improve planning and management of submerged land;
- clarify the process for approval and denial of proposed projects.

BACKGROUND INFORMATION ON THE CURRENT SUBMERGED LANDS PROGRAM**Definition of Submerged Lands.**

In 1975, the Bureau of Public Lands was charged with the responsibility for managing state-owned submerged lands. These include:

Coastal region (including islands): All land from mean low watermark out to the three mile territorial limit. Where intertidal flats are extensive, the shoreward boundary begins 1650 feet seaward from the mean high watermark.

Tidal Rivers: All land below the low water mark of tidal rivers upstream to the farthest natural reaches of the tides.

Great Ponds: All land below the natural low watermark of ponds which in their natural state are 10 or more acres in size.

Boundary Rivers: Land lying below the low water mark of those rivers that form Maine's border with Canada.

Pursuant to the Massachusetts Colonial Ordinance of 1641-1647, Maine's publicly-owned submerged lands begin at the low water mark. In this respect Maine differs from most other coastal states, the majority of which are "high water" states; that is, they define their publicly owned submerged land by the high water mark. Thus most other states retain jurisdiction over a significantly greater portion of their coastal lands. Because of this wider jurisdiction many of these states tend to have larger submerged land programs and broader authority than Maine even though they have less coastline.

Goals

The primary goal of the Bureau in managing submerged lands is to fulfill its obligation as steward of the public trust and provide the greatest long-term benefits for the people of Maine. Foremost among these is the responsibility to keep the submerged lands available for public use in keeping with the doctrine of public trust. Public trust uses are fishing (including commercial fishing), hunting ("fowling"), navigation, and recreation (note: There is not complete agreement on the question of whether or not recreation is a public trust right; 12 M.R.S.A. § 573 defines public trust rights on intertidal land to include "The right to use intertidal land for recreation". This definition should logically extend to state-owned submerged lands as well since they are subject to the same customs and uses

as intertidal lands. While the constitutionality of applying this definition to privately owned lands may be in doubt, the application of this definition to publicly owned land appears reasonable. In general, the Bureau of Public Lands regards recreation as a principal and appropriate use of publicly owned land within its jurisdiction).

In keeping with the doctrine of public trust, developments that conflict with public use are discouraged. Uses that are water dependent are favored over those which could take place in upland areas or which require filling.

Scope

In 1975, the Submerged Lands Act authorized the Bureau to convey interest in submerged lands for limited periods to private persons for the purposes of dredging, filling, or erecting structures. There were three major exceptions to the requirement for a state issued lease or easement for use of submerged lands: 1) Structures existing as of October 1, 1975 were granted constructive easements that remain in effect until September 30, 2005. Bureau regulations adopted in 1986 require a new lease or easement in the event that there is a significant change in the nature or intensity of the use of the structure; 2) Submerged Lands that had been filled prior to October 1, 1975 were released by the state and became private property; 3) Structures which remained in place for 7 months or less each year would not require a lease or easement.

The Bureau is not authorized to issue leases for aquaculture or mining. Leases for these uses are administered by the Department of Marine Resources and the Maine Geological Survey respectively.

Management of submerged lands has not been a regulatory program. The Bureau serves as a steward of these publicly-owned lands and has the power to convey interests to private entities through easements or leases, depending upon the size and scope of the project. Compensatory measures, such as providing public access or improving navigation may also be required. The maximum term for any conveyance is 30 years. Leases are renewable pending review and approval by the Bureau.

The Bureau may approve leases subject to the evaluation criteria described in the Bureau's Rules and Policies Manual (adopted under the

authority of Title 12 M.R.S.A. § 558-A, effective March 15, 1986). At present the Bureau has 169 leases and 1386 easements for structures and an additional 53 active dredging leases. Rental fees, which are set by statute, currently generate approximately \$37,000 in rent annually. There is no accurate count of the number and types of grandfathered structures under constructive easement, though it is certain that they outnumber all current leases and easements.

Review Process

To comply with environmental regulations, development that takes place on or over submerged lands routinely requires a permit from the Department of Environmental Protection or the Land Use Regulation Commission. Before a permit can be issued, the applicant must demonstrate legal right, title, or interest in the site. Often the public is not aware of the State's ownership of submerged lands, so the regulatory agency issuing the permit automatically notifies the Bureau of the application. The Bureau in turn notifies the applicant if they must first receive a lease or easement from the State before their application can be approved.

The Bureau then reviews the project to determine if it will provide long-term benefits to the people of Maine consistent with the needs for public access and the public trust rights of fishing, fowling, navigation and recreation. If the project will not adversely impact the public trust or access, the Bureau may issue a lease. At the same time, the permitting agency and other appropriate agencies assess the impact of the project upon scenic, aesthetic, recreational and navigational uses, and environmental, and marine resources. If the permit is denied for any reason, a lease will not be granted, or if it has already been issued, becomes invalid.

If either the Bureau or the permitting agency finds that the project will adversely affect public access or existing resources the lease may be denied or mitigation measures may be required to offset the project's impact.

To reserve submerged lands for water dependent uses, those uses that might otherwise take place in upland areas can only be approved if the municipality has zoned the adjacent upland and intertidal zone for upland uses. In addition, the applicant must demonstrate that there is no other

reasonably available alternative site, and that there is no current or reasonably anticipated unmet demand for other, more appropriate uses.

Implementation of Coastal Management Resource Policies

In 1986 the Maine Legislature enacted P.L. 794 An Act to Enhance the Sound Use and Management of Maine's Coastal Resources (38 MRSA § 1801). This legislation identified 9 coastal policies and directed state agencies with jurisdiction over coastal resources to incorporate these policies into their planning and management activities. The current program has addressed these objectives through the following policies:

- Supporting commercial fishing through a favorable lease fee structure.
- Reviewing proposed projects involving upland type uses or filling of submerged lands to determine impact on public trust rights. Leases may require mitigation to facilitate public access or they may be denied outright.
- Denying submerged land leases for proposed developments in areas deemed hazardous or subject to erosion by the Maine Geological Survey or The Department of Environmental Protection.
- Denying submerged land leases for proposed developments that would have an adverse impact upon air quality, water quality, or fisheries resources as determined by the Department of Environmental Protection or the Department of Marine Resources.

Looking ahead

Despite existing policy directives, it is inevitable that the Bureau will face some conflicts over its leasing policy and stewardship responsibilities. For example, state policies call for promotion of commercial uses of renewable marine resources, some of which may unavoidably impede navigation or recreation. In addition, some new water dependent uses may be incompatible with established uses. As development and user pressures over the waters of the State increase, these conflicts will also increase.

Another major task will face the Bureau at the end of the constructive easement period in the year 2005. At that time, grandfathered structures will require a lease or easement to continue to occupy state owned submerged land. Many of these easements are for uses that would not be permitted under current policy because they would be considered upland uses (restaurants, motels, retail stores). If the leasing system proposed by this study is

adopted, new leases for these uses will require rental fees that are based on the fair market value of the adjacent upland, which will mean a substantial financial obligation for the user. The Bureau will also have to initiate field inspections to ensure that lessees are complying with the terms of their leases.

The Bureau will strengthen its application review process to ensure the protection of public access and public trust rights. If the Bureau determines that proposed projects are inappropriate they will deny the application or suggest appropriate changes to the applicant. Even when a project is acceptable the Bureau may still require specific public benefits as a condition of its submerged land leases.

Finally, the Bureau, in coordination with the Department of Economic and Community Development and the State Planning Office will spend more time assisting local communities in their efforts to plan for controlled, long-term growth management on submerged lands.

ADEQUACY OF FEES

Basis for Current Fees

In 1975 the Submerged Lands Act, Title 12 M.R.S.A. § 558, directed the Bureau of Public Lands to lease and grant easements for the use of state owned submerged lands. Initial fees were established by statute at a flat rate of \$.01 per square foot per year. In 1977 fees were increased to \$.03 and in 1984, fees were raised again to current levels through an ammended Submerged Lands Act. These fees are explained in detail in the "Submerged Lands Program Rules and Policies Manual" (Bureau of Public Lands 1986) and are summarized in Table 1.

The current fee structure is designed to favor water dependent uses which are defined in the Coastal Management Policy Guidelines (State Planning Office 1986) as:

"Those uses that require, for their primary purpose, location on submerged lands or that require direct access to, or location in, coastal waters and which cannot be located away from these waters. These uses include, but are not limited to, commercial and recreational fishing and boating facilities, finfish and shellfish processing, storage and retail wholesale marketing facilities, marinas, navigation aides, basins and channels, industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or processing water that cannot reasonably be located or operated at an inland site and uses which primarily provide general public access to marine or tidal waters."

Public facilities and commercial uses of renewable aquatic resources are especially favored. Public faciities, such as town docks and municipal fishing piers, that offer free public use or charge only nominal user fees require only a one time administrative charge and no annual lease fees. Facilities for commercial uses of renewable aquatic resources, such as lobster pounds or docks for offloading fishing vessels, are assessed only minimal charges. Finally, "grandfathered" structures which were in place prior to October 1, 1975 were granted constructive easements for 30 years during which time no annual lease fees are required. Beginning in the year 2005, these

grandfathered structures will be required to obtain an appropriate lease and pay the applicable fee. Most of the grandfathered structures have not yet been catalogued and may number more than a thousand.

Table 1. Current fee structure for conveyance of interest in state-owned submerged lands.

- A. Constructive Easements
1. granted to "grandfathered" uses until 2005
 2. no fee (change in use or size requires new conveyance with fee)
- B. Easements
1. granted for:
 - a. charitable purposes by a non profit organization owning the abutting upland
 - b. approved uses of less than 500 square feet
 - c. approved commercial water dependent use of renewable natural resources of less than 2000 square feet
 - d. harbor improvement projects by the Army Corps of Engineers
 2. one time administrative fee of \$15.00
- C. Dredging
1. for navigational purposes only, a one time fee of \$75.00
 2. if the dredged material is to be sold for a profit, the fee will be based upon the fair market value of the material sold
- D. Leases
1. granted for filling, underwater cables, and permanent structures, subject to approval
 2. all have a one time administrative fee of \$25.00
 3. base rates for annual fees:
 - a. commercial use of renewable aquatic resources, \$.01 per square foot
 - b. water associated or water dependent uses, \$.02 per square foot
 - c. upland uses, filling, or other undesirable uses, \$.04 per square foot OR fair market value determined by an appraisal
 - d. pipelines and cables - \$.04 per square foot OR pipelines may also be based upon volume of material transported
 4. base rate adjustments for any of the above, may be increased a maximum of 10% per year
 5. no annual fees are charged for the following:
 - a. municipal facilities that offer either free public use or charge only the minimum fee necessary to operate the facility
 - b. municipal sewer and water districts
 - c. government facilities
-

Need for a Change in Fee Structure

In recent years the demand for submerged lands has grown significantly in response to increasing development along the coast. From 1986 through 1988, the Bureau of Public Lands received 487 applications for leases and easements. The complexity of these applications has also increased as the nature of development has expanded to include uses such as residential housing, commercial office units, and dockominiums, which were not major concerns when the leasing program was established. As the number and complexity of development proposals has expanded, so has the need to review permit applications and to coordinate and share information about developments with other state agencies and municipalities. In light of this need the submerged land management program has been compelled to grow, and the inability of the fee structure to cover the cost of the program has been magnified. Under the current fee system, the submerged land program had an income of \$38,498.00 in 1987. The best estimate of the program's annual needs as outlined within the scope of this report is \$125,000.00.

A change in lease fee structure is also an appropriate means to implement Maine's Coastal Policies. While truly undesirable uses should be denied outright, there will be some allowable uses which are less desirable than others because they create an adverse impact upon public access, public trust uses, or the marine industry infrastructure. These projects should be charged higher lease fees, thereby allowing the Bureau to continue to charge lower rates for more desirable uses.

The current lease fee structure is not sufficient to support a submerged land management program nor does it provide an adequate basis for charging higher rates for less desirable uses. Therefore, it does not yield a fair rate of return to the State.

What Should Lease Fees Cover

In order to yield a fair rate of return, rental fees should be administratively and economically efficient, and provide compensation to the public for private use of submerged lands.

1) Administrative efficiency

The Bureau of Public Lands depends solely upon dedicated revenue, generated by its own programs, to fund its operations. Most programs must therefore "pay their own way".

In some other states, revenue from submerged land leases is used to fund public education, to provide public boating facilities, public walkways, and access trails, and to manage submerged lands programs. At a minimum, Maine's lease fees must provide adequate revenue to cover the cost of administering the submerged lands program. The basic objectives of this program, in keeping with the Coastal Management Policies Act of 1976, would be to ensure public access over submerged lands, preserve public trust rights, and encourage development of appropriate water dependent activities. The program staff must also participate in the coastal planning and growth management process, develop reasonable mitigation measures when they are needed and, to ensure fairness, monitor and enforce compliance with the terms of the approved leases.

Costs would depend upon the level of program responsibility. Table 2 outlines a program structure that would be adequate to meet the State's minimum responsibility for managing submerged lands under current conditions. Under the proposed structure, costs include:

- staff and computer time for administering the program;
- conducting a thorough review of applications;
- acquisition and interpretation of resource information, such as aerial photos and on the ground surveys;
- compliance checks;
- inventory of existing structures under constructive easement;
- some mapping and geographic analysis in coordination with a statewide Geographical Information System;
- staff time for planning and preparing reports and educational materials for the public;
- responding to requests for assistance; and
- coordinating educational and planning programs with other state agencies such as the Office of Comprehensive Planning, the Department of

Environmental Protection, the Department of Marine Resources, the Department of Transportation, and the State Planning Office.

Table 2. Proposed program responsibilities for a submerged land management program within the Bureau of Public Lands.

Submerged Lands Program Coordinator:

- Develops and recommends policies for submerged land management.
- Assists municipalities and other state agencies in planning submerged land development patterns.
- Supervises and assists Submerged Lands Technician.
- Reviews conditions of leases and recommends approval or denial.
- Coordinates application review with other state agencies.
- Recommends public benefit measures for specific projects when required.
- Prepares special reports on submerged land issues as needed.
- Conducts analyses and reviews information on submerged land resources, maintains information file.
- Produces educational materials and programs, attends pertinent conferences as representative of the Bureau.

Submerged Lands Technician:

- Lease application review & preparation
 - First line of contact for leaseholders, developers, & municipalities.
 - Conducts field surveys.
 - Catalogues existing structures under constructive easement.
 - Mapping and aerial photography interpretation, in cooperation with staff cartographer.
-

2) Economic efficiency & public compensation

Lease fees should reflect the economic value of the land and must also represent just compensation for private use of a public resource. This compensation should generally take the form of public benefits such as walkways, fishing piers, parking lots, boat ramps, and public docks to create, replace or enhance public access opportunities and ensure public trust rights.

To obtain public compensation, the Bureau proposes to require leaseholders to do whatever is necessary, appropriate, and desirable in the vicinity of the project. These measures will vary depending upon the needs and the existing facilities in the area. For example, some facilities, by the nature of the services they offer, will enhance public access and therefore require no additional compensation measures. In other instances public amenities must be provided on a case by case, as-needed basis and be a condition of the lease. In time, some additional money may be available for funding projects that provide public benefits, but for the immediate future, lease fees alone will not be sufficient to provide such facilities as launching ramps or fishing piers.

Limitations of Lease Fees

It is not practical to attempt to discourage undesirable uses solely through expensive fees. High costs may be absorbed by a large developer with an undesirable proposal without undue hardship, but may act as a deterrent to municipalities or smaller but more desirable proposals. A more active approach to guiding development is to develop and use well defined criteria to approve or deny applications. If truly undesirable uses are denied under clearly defined criteria, there will be no need to rely on differential lease fees to discourage them. Fees would instead be tied to fair market value, which will vary with proposed use and location, but would still return enough revenue to cover the cost of the program.

Who Will be Affected by Changes in Fee Structure

Once adopted, new fee structures would apply to any subsequently-approved leases. A change in fee structure will also have an impact upon current leaseholders, since under the terms of a standard Bureau lease, rental rates may be adjusted to reflect changes in lease fee structure. The proposed lease fee system reflects an increase for all private users of submerged lands, but still retains favorable, reduced rates for projects that provide public benefits or involve commercial fishing industries.

Proposed New Fee System

Method for determining Lease Fees:

1. Determine which category applies to the proposed use.

Some uses of submerged lands are more desirable than others because of the public benefits they provide. The desirability of most uses has already been established through the state's Coastal Policy Management Guidelines and the existing general policies of the Departments of Environmental Protection, Conservation, and Marine Resources. Four general categories are proposed: Public Uses, Commercial Fishing & Related Uses, Water Dependent Uses, and Upland Uses & Fill.

For the purpose of determining rental fees, it is possible that a project may fall into more than one category. If so, different sections of the project may be charged different rates. For example, a marina with its office located on a pier would pay the upland rate for the space occupied by the office, but would receive a lower water dependent rate for the rest of the pier and associated floats.

2. Determine the municipally-assessed value.

There are a number of ways to determine the value of a parcel of submerged land. Appraisals and various methods based on income or ability to pay are used in some other states and were suggested as possible methods for Maine's program. However, this proposal recommends that the value be linked to the municipally-assessed value of the adjacent upland. This method is simple to use since the value of the adjacent upland can be readily obtained. It also eliminates the time and expense of performing individual appraisals or examining lessees' financial records. Since property values will vary with location, regional economic differences are already incorporated into the value. Towns that wish to encourage water-dependent uses usually have zoned their shoreland to reflect this. They are likely to report lower assessed values for shorefront property that is subject to restrictive zoning than similar towns in the same region that do not have zoning restrictions on shorefront uses. Rental rates that are consistent with town assessed values result in a leasing policy that more accurately reflects the goals and planning objectives of the local

communities. The Bureau would retain the option of requiring an appraisal for specific proposals.

3. Apply the appropriate reduction to the assessed upland value to determine the value of the submerged land.

Submerged lands have historically been used by upland abutters without requiring those users to pay any compensation to the lawful owners; the public. In addition, most water dependent uses of submerged lands have traditionally been valued less than upland uses. It is therefore reasonable to assign a value to submerged land that is somewhat less than the value of adjacent upland, unless it is to be used for upland purposes. Water dependent uses should receive a reduction from the full upland value based upon the extent to which they provide public benefits, their dependence upon being located upon the water, their ability to profit from their location upon the water, and their desirability as determined by existing state policy.

This proposal recommends that, at this time, the value of submerged land for commercial fisheries and related uses should be 10% of the assessed upland value and for other water dependent uses it should be 20% of upland value. However these percentages should be re-evaluated periodically by the Bureau to ensure that they continue to represent a fair return to the State. Upland uses should pay the full upland value. Free or minimal cost public uses would not be required to pay any rental fees. These fees will eventually provide enough income to support the submerged land program and yield a fair return to the State. They also reflect local economies and zoning and planning initiatives.

4. Apply an annual rental rate of 10% to the calculated value.

A 10% rental rate is simple to apply and approximates the average rate of return for public programs. When combined with appropriate reductions for use categories, it is also comparable to the rates charged by other states and provinces with submerged land leasing programs. However, the 10% rental rate should be re-evaluated periodically by the Bureau and may be adjusted to reflect a fair rate of return.

5. Other categories

Pipelines & Cables: A flat fee of \$0.02 per linear foot. This represents a moderate increase over current rates. Municipal uses remain exempt.

Dredging: An incremental fee will be based upon the quantity of material to be dredged. Some of the funds derived from dredging fees will be used to support research conducted by the Maine Geological Survey or other appropriate agencies into the effects and implications of dredging.

Proposed Categories of Use for Determining Value of Submerged Land

CATEGORIES	PERCENT OF UPLAND VALUE (100% = full upland value)
<p>1. Public uses that are free or charge only minimal user fees.</p> <p>- municipal utilities and facilities that provide public access to the water such as town wharves, walkways, fishing piers, boat launches, parks, nature reserves, swimming or skating areas, and other projects designed to allow or enhance public recreation, fishing, fowling, and navigation.</p>	0%
<p>2. Commercial uses of renewable aquatic resources.</p> <p>- facilities 2,000 square feet or larger that are directly involved in the harvesting, unloading, and transporting of products of the sea such as fish piers, lobster impoundments, fish processing facilities, berthing for fishing boats, and floats or piers for the storage of gear. Structures under 2,000 square feet only require an easement. <u>Note:</u> To qualify for this rate, a marina must have at least 50% of its slips in use by commercial fisherman year round.</p>	10%
<p>3. Water dependent commerce, industry, and private uses.</p> <p>- uses 500 square feet or larger that are functionally dependent upon a waterfront location and cannot reasonably be located or operated on an upland site or are key elements of the marine industry infrastructure. These include but are not limited to privately owned piers and docks, cargo ports, boat ramps, shipping & ferry terminals, tug & barge facilities, watercraft construction, maintenance, or repair, aquariums, and marinas that have less than 50% of their slips in use by commercial fishermen. Facilities of less than 500 square feet only require an easement.</p>	20%
<p>4. Upland uses and fill.</p> <p>- uses that can operate in a location other than on the waterfront.</p>	100%
<p>5. Privately owned pipelines & cables.</p>	flat fee of \$.02 per linear foot

6. Dredging.

- for navigational improvements that benefit the public. 0
- for navigational improvements that benefit only private or commercial facilities. incremental fee.
 - less than 1000 cubic yards \$100.00
 - 1000 to 4999 cubic yards \$250.00
 - 5000 to 9999 cubic yards \$500.00
 - 10000 or more cubic yards \$1000.00
- when sand & gravel are removed for private use. fair market value of material removed

There will be a one time processing fee of \$100.00 for leases and \$50.00 for easements. In addition there will be a registration fee of \$25.00 due every 5 years for all easements, including constructive easements.

The proposed new fee system will result in increased rental fees for submerged land leases, which will vary with location. Table 3 lists seven coastal towns representing a range of upland values and illustrates how much rates will increase for the 3 major use categories. As an example, a 5,000 square foot commercial fishing pier now pays an annual rent of \$50 (\$.01 per square foot). Under the new system rent for the same size pier would increase to \$69 in Phippsburg, \$184 in Stonington, and \$803 in Portland. Likewise a 100,000 square foot marina which now pays \$2,000 would have annual rent payments of \$2755, \$7345, and \$32,140 respectively in the same locations. These examples are based on approximate values; in an actual lease, rates would be tied to specific upland locations so there would be some variation from these in any given harbor.

Table 3. A comparison of current annual rental rates (in parentheses) with proposed new rental rates that are based on fair market value.

TOWN	WATERFRONT PROPERTY VALUE PER ACRE	COMMERCIAL FISHING (\$.01/sq. ft.) NEW RATE \$/sq. ft.	WATER DEPENDENT USES (\$.02/sq. ft.) NEW RATE \$/sq. ft.	UPLAND USES (\$.04/sq. ft.) NEW RATE \$/sq. ft.
PHIPPSBURG	\$60000	.014	.028	.14
ELIOT	\$37000	.020	.040	.20
EASTPORT	\$90000	.021	.042	.21
STONINGTON	\$160000	.037	.074	.37
NORTHPORT	\$175000	.040	.080	.40
CAMDEN	\$200000	.046	.092	.46
PORTLAND	\$700000	.161	.322	1.61

To facilitate the transition to the new rental rates, current leases should be adjusted gradually to phase in the new, higher rates. The Bureau recommends that, beginning in 1990, the phase-in period for commercial fishing and water dependent uses be 5 years. For upland uses, the phase in period should be 10 years because of the much larger relative increase. The approximate average increase in revenue from existing leases would be \$18,661 per year for the first 5 years of the phase in period (Table 4). This does not include additional revenue from processing fees and new leases.

Table 4. Projected revenues from current leases for submerged land program under proposed new lease structure. Projections based on average assessed upland values from table 3.

CATEGORY	1987 Income	Projected Income When Full Rate is Reached	Phase-in Period (years)	Average Annual Increase in Revenue
Commercial Fisheries & Related	\$ 1,175	\$ 4,190	5	\$ 603
Other Water Dependent	31,545	108,398	5	15,371
Upland Use	5,280	31,079	10	2,580
Cables & Pipelines	498	1,034	5	107
TOTALS	38,498	144,701	-	18,661

In some cases, it may be desirable to consider an annual cap on the amount that existing leases may be raised. This is especially apparent for upland uses, where rates will increase substantially, particularly in regions with high land values like Portland. All current leaseholders will be notified of the change in their rental rates and the phase in process in 1989. All new leases will be immediately subject to the new rates.

Administering Fees

The proposed new fee system will meet the following criteria:

- Fair return to the State. The fee structure will return enough income to the Bureau to cover the cost of administering the program and appropriate compensation to the public for the private use of submerged lands.
- Ease of administration. The system can be easily handled by the program staff as proposed in table 2.
- Comprehensibility. Lessees will be able to readily understand what their costs are and what their rights and responsibilities are so that they can comply with all terms and conditions of their lease.
- Fairness. The system will be administered equitably to all leaseholders.
- Comprehensiveness. All activities or structures requiring a lease will be brought into compliance with the leasing system.

Conclusion regarding adequacy of lease fees

Current lease fees are not adequate to cover the cost of a submerged lands management program; an increase in rental rates is proposed. Lease fees will be based in part upon a market value system that considers the type and location of each project. Higher fees will be charged for less desirable upland uses and fill. In future years, when revenue may exceed the cost of administering the submerged lands program, available funds will be used to provide additional public benefits. Specific public benefit programs will be identified at that time but may include an access acquisition fund and other similar programs.

ACCESS

Overland access to the waters of the State is an upland issue and in general is not directly controlled through submerged land management. Only when a specific project extends onto submerged land is it possible for this Program to exert any influence over shoreland access. In such cases, the Bureau has occasionally required that provisions for overland access be included as a condition of the lease if deemed necessary by the Bureau. The Bureau proposes to continue to require that adequate provisions for access, or other appropriate public benefits, be included as a provision of the lease.

Access over the waters of the State is directly affected by submerged lands leasing policies since any filling or construction on submerged lands can impede navigation to some extent. However, many projects can also enhance access over water by; 1) allowing boatowners easier access to and from their boats, 2) providing more orderly storage of idle vessels, thus freeing space for fishing and navigation, and 3) improving navigation through dredging operations in areas susceptible to natural filling.

Access however does not necessarily mean unimpeded freedom for all uses on all sites. The situation is analagous to the multiple use concept utilized by the Bureau on its upland units. "Multiple use" on upland sites does not mean every use on every acre. For example, timber harvesting operations are designed to avoid hiking trails and campgrounds. Likewise, recreational boaters and commercial fisherman cannot be expected to equally share every square foot of submerged land for all uses at all times. Therefore, the Bureau recommends that some areas be designated for their most appropriate uses, while conflicting uses within the area are restricted. Through the Submerged Lands Program, the Bureau will work with local communities, the Office of Comprehensive Planning, Regional Planning Councils, and the State Planning Office to help to minimize user conflicts.

Assuring Public Access

The Submerged Lands Rules and Policies require all applications for conveyances of submerged lands to be reviewed to assess the potential adverse impact on public rights, customs and uses, which includes access. Applications may be denied where, in the opinion of the Bureau Director, there

is an undue adverse impact. Additionally, the State's Coastal Management Policy Guidelines specifically require State agencies to consider access to coastal waters in their management programs (State Planning Office 1986).

At present, water dependent projects are evaluated on a case-by-case basis. This can result in unbalanced development patterns and a failure to anticipate when an area's carrying capacity for development is being approached. In order to understand the overall pattern of waterfront development and its impact on access, there is a need to consider community planning goals as well as the cumulative impact of projects, rather than considering each project as a separate entity.

Compensation when Access is adversely affected

The Bureau proposes that if a review of the project reveals that it will adversely affect public access, the Bureau may require the developer to provide public access facilities either as a part of the project or adjacent to the project area as a condition of the lease or the project could be denied outright and the area reserved for a more appropriate development.

Conclusion regarding accessibility

Public access has been and will continue to be a high priority concern of the submerged lands program. Projects can result in both positive and negative effects upon public access and must be considered on a case by case basis. Conflicts over access are inevitable, but can be minimized through planning and consideration of overall and cumulative effects. Measures to provide or enhance public benefits should be required as a condition of the lease whenever necessary and appropriate.

COMMERCIAL FISHERIES & INDUSTRY**Current Policy**

Current policies and lease rates are designed to favor the commercial fishing industry. The Coastal Management Policy Guidelines require government agencies to "Give priority for water-dependent over competing uses for the shoreline." and also stipulate that "Government agencies will give preference to commercial, over recreational uses." These policies are reflected in current lease fee schedules which require lessees to pay only \$.01 per square foot for leases that involve the commercial use of renewable aquatic resources. This is 25% of the base rate and is the lowest lease fee collected by the Bureau except for public access projects, such as municipal piers, which require no annual lease payment.

Minimizing adverse impacts to commercial fishing

Projects that could adversely impact water quality, the marine environment, or biological or geological resources are routinely screened by the Department of Environmental Protection in the permit review process. If the DEP denies a permit for a project, the applicant is automatically denied a submerged lands conveyance.

DEP's authority to either deny permits or impose conditions upon permits extends to the following:

- Existing scenic, aesthetic, recreational, or navigational uses
- Soil erosion
- Habitats & fisheries
- Natural water flow
- Water quality
- Flooding
- Sand supply
- Outstanding river segments

However, current DEP permit review procedures do not consider impacts to the marine industry infrastructure. This infrastructure includes those accessory uses that are necessary for successful operation of a commercial fishing industry such as mooring space, places to lay out and store gear,

boatyards offering repairs and supplies, fuel and ice stations, unloading facilities, room to maneuver in channels and harbors, uncongested fishing grounds, and other resources that may offer future benefits.

The BPL may deny a lease application for specific reasons, but these do not include an adverse impact upon the marine industry infrastructure. P.L. 765 requires the Director of the Bureau of Public Lands to increase lease rates for undesirable uses that impair future fishing uses on submerged land. However, simply raising lease fees will not be a sufficient deterrent to prevent undesirable development. If a site is sufficiently valuable to the marine industry to warrant protection, a project that diminishes its value without offering compensatory values of a similar nature should be denied. No agency has clear statutory authority to do so. The logical place for this authority to reside has not been resolved.

Determining the impacts

To review applications, permitting agencies, such as LURC and DEP, rely upon their own internal expertise as well as the expertise of other agencies such as the Departments of Marine Resources, Inland Fisheries & Wildlife, and Conservation (Maine Geological Survey and Bureau of Public Lands) and the State Planning Office. For the purpose of determining significant adverse impacts upon the marine industry infrastructure (infrastructure), the Department of Marine Resources would be the principal review agency.

The issue of infrastructure has been widely debated during the course of this study but no satisfactory resolution has been proposed. While it is generally agreed that infrastructure needs to be considered, there are too many uncertainties at this time to suggest a definitive approach to incorporating infrastructure into the decision making process.

The Coastal Management Policy Guidelines already require that "Government agencies have a responsibility to assure that new or expanded activities in these (port and harbor) areas will be compatible with, and will not degrade their current and future use as a port and harbor area". Stated policy objectives and implementation procedures make it clear that commercial fishing is a preferred, water dependent port and harbor activity. The guidelines also state that "Government agencies will actively support infrastructure and services required for water-dependent uses".

However, there are several unresolved problems:

1. No definitive criteria have been established to determine what constitutes a critical adverse impact on infrastructure. It would be premature to include infrastructure in the decision making process without first defining how critical adverse impacts will be determined.
2. Infrastructure should be reviewed within the context of other criteria so that applicants do not face a series of separate review processes. Both opponents and proponents of development projects should have an opportunity to provide input into the decision making process. The mechanism for public input has to be clearly defined.
3. There are drawbacks to having infrastructure included in the application review criteria of either the Department of Environmental Protection or the Bureau of Public Lands.

DEP: The DEP already has a large workload and does not have enough available staff to take on new responsibilities. There is also some question as to whether it is appropriate for DEP to review the socio-economic factors that are often key infrastructure components.

BPL: Under its current jurisdiction, the BPL can affect only those projects that are proposed for submerged land and not those on the upland or intertidal zone, which are likely to make up a majority of the projects of concern.

- There is also general concern that creation of a new and separate review process, which may involve hearings and appeals, may lead to greater public confusion about the leasing and permitting process.

Each of these drawbacks can be addressed, but to do so will require a coordinated and cooperative approach by all the agencies involved.

4. Additional time and personnel will be needed by DMR, as well as by the decision-making agencies, to review infrastructure. This is likely to engender a longer review period for some applications.
5. Many impacts upon infrastructure, such as economics, changes in ownership, and other sociological factors will be beyond the scope of a regulatory or leasing program. In order to maintain infrastructure in a meaningful way it may be necessary to provide incentives or require penalties to preserve infrastructure, i.e. make it a condition of approval that an infrastructure type use may not change, or if a change does take place, then a substantial penalty will be imposed.

After discussing this issue extensively, the Bureau concludes that infrastructure is a more complex issue than the Submerged Lands Study and the

advisory committee initially recognized. No one has a good grasp of all the underlying facts and data, the physical composition of infrastructure, the criteria needed to evaluate it, nor the process by which it should be evaluated.

Therefore, the Bureau proposes that a task force be assembled to resolve these issues. Since the infrastructure issue requires statewide policy decisions that involve the Coastal Management Policy Guidelines and crosses the ordinary jurisdictional bounds of a number of State agencies; DEP, BPL, DMR, and DECD, the task force should probably be headed by the State Planning Office. Alternatively, the study could be headed by BPL as part of the submerged lands program or by DMR under its marine fisheries development program.

The duties of the task force should include:

Clearly define infrastructure; not just what it is, but also where it is and who is involved in it.

Explore the possible impacts upon infrastructure. This will help determine how to review them.

Develop the evaluation criteria and determine what constitutes a critical impact.

Determine how the applicant must address the evaluation criteria; what questions must be answered, what data must be supplied.

Determine how to protect infrastructure from upland development and intertidal development.

Determine how to protect infrastructure when it is threatened by something other than a nearby project (such as; changes in ownership, general use trends, municipal development patterns, demographics, or economics).

Determine who will review infrastructure, what the review process will be (applications, hearings, appeals), who will deny or approve projects, what additional personnel will be needed, and in which agencies.

Develop and propose the necessary clarifications, additions, definitions, and changes in current policies, rules and legislation.

Develop appropriate informational material for applicants and the public.

Schedule whatever public hearings will be necessary for the adoption of new rules covering infrastructure.

Planning for the future protection of the Commercial Fishing Industry

Denying permits or requiring mitigation measures when proposals have potentially adverse impacts upon the commercial fishing industry is a necessary step in affording protection to the industry. But it is principally a reactionary approach; decisions are made on a case-by-case basis and only when an actual project is proposed. Submerged Land Planning can also take a more active approach to maintaining and enhancing the commercial fishing industry by:

1. Establishing "bluebelts" where activities that would interfere with fishing are prohibited. Similar in concept to "greenbelts", these areas would be set aside for appropriate uses that protect or enhance the marine ecosystem and industry infrastructure. Determining locations and appropriate uses would be done in cooperation with the Office of Comprehensive Planning, the State Planning Office, the Department of Marine Resources and the local communities under the directives of the State's Growth Management Legislation.
2. Retaining favorable leasing terms for commercial fishing and related industries. Present lease rates are very favorable for commercial fishing interests, but are too low to be administratively efficient. The commercial fishing industry will be asked to pay higher lease fees. However, the new fee structure will still favor the commercial fishing industry with reasonable rates. Since the State's Coastal Management Policies require state agencies to favor commercial fishing over recreational and other uses, it seems appropriate to charge higher fees to other profit making ventures to help offset some of the revenue loss from lower commercial fishing industry lease rates.
3. Maintaining water-dependent uses. Service industries that are required by commercial fishermen, such as boat yards, fueling stations, and marine supply stores depend upon recreational boaters as well as commercial accounts to keep their businesses afloat. When boating interests are displaced by non-water dependent uses, the related service industries also disappear. Working waterfronts can be favored through planning and appropriate leasing policies.

Conclusion regarding Commercial Fisheries & Industry

Commercial fishing is favored by current leasing policies. Any changes in these policies will continue to recognize the unique importance of commercial fishing in Maine and continue to favor the industry over other uses. Leasing policy will also favor those accessory uses upon which the industry depends. Applicants for submerged land leases must demonstrate through the permitting process that their proposed development will not adversely affect the commercial fishing industry. There is a need to further study the issue of marine industry infrastructure.

DOCKOMINIUMS

Definition

A dockominium is a marina in which berthing slips are either sold or leased on a long-term basis. This results in a financial arrangement for consumers that is essentially identical to a condominium arrangement as defined by the Maine Condominim Act (33 M.R.S.A. Chapter 31). Dockominiums differ from conventional operator-owned marinas primarily in form of ownership. Other differences are highlighted in table 5. There are a number of potential variations on the dockominium theme that utilize condominium concepts without actually creating a formal condominium. Boat slip associations which own the facility as a group, and "common law condominiums" in which the slip holders agree to be governed by the provisions of the Maine Condominium Act have both been used successfully in Maine.

Table 5. Differences between dockominiums and traditional marinas.

	<u>Marinas</u>	<u>Dockominiums</u>
Availability of slips	seasonal rental	sale or long term lease
Management of facility	proprietor	leaseholder association
Slip price	seasonally adjusted	fixed for length of lease
Maintenance costs	borne by proprietor	distributed among leaseholders

History

Dockominiums are a fairly recent development within the marina industry. In the past decade, the concept has emerged as an alternative to conventional long term financing of marina projects for such purposes as new construction, expansion, rehabilitation, and debt restructuring. Since construction of new facilities is limited by high costs and a lack of suitable undeveloped sites, most dockominiums in the eastern U.S. are conversions of existing marinas rather than new construction.

In Maine, the first dockominium proposal was brought to the attention of the Bureau of Public Lands in 1986. At that time, the Bureau received a request to lease the submerged lands adjacent to a condominium housing

development for use as a marina. As details of the project were reviewed, it became clear that the developer intended to sell the slips on a permanent basis, an arrangement that was new and unfamiliar to the Bureau. After the approval of the lease, the Bureau learned that it was required to sign "Condominium Documents" as a provision of the Maine Condominium Act.

Consumer protection provisions of the Condominium Act require lessors to sign documents that limit the lessors' ability to terminate a lease agreement. When the Act was passed, the notion of the State leasing publicly owned submerged lands for condominium units was not contemplated. As a result, a conflict exists between the Bureau's role as protector of public trust rights on submerged lands, which may necessitate termination of a lease, and the State's role in providing consumer protection.

Current Policy

Because the Bureau had already approved the lease for the marina, it reluctantly signed the Condominium Documents. Subsequently adopted policy prohibits the Bureau from entering into any new submerged land leases where docking slip space is to be sold. The Bureau may, however, approve subleasing arrangements that do not exceed the terms of the principal lease and do not create a formal leasehold condominium. While these arrangements do not require the Bureau to sign Condominium Documents, the arrangement is still, for all intents and purposes, a type of dockominium. At present, no new leases may be subleased for more than 5 years under the provisions of P.L. 765.

Desirability of Dockominiums

P.L. 765 directed the Bureau to study the desirability of dockominiums. Dockominiums present both positive and negative concerns that should be weighed to determine their desirability.

There are two parts to the desirability question. The first part of the question is whether the general proliferation of marinas is desirable. The second part is whether the condominium style approach to marinas is desirable.

Proliferation of Marinas

Presently, there is a high demand for berthing space for pleasure boats along the Maine coast. This has resulted in the expansion of existing marinas, conversion of fishing piers and other waterfront facilities into marinas, and some new construction. This proliferation of facilities catering to pleasure boats has contributed to congestion and its attendant problems, such as pollution, increased noise, inadequate parking space, and disturbance to wildlife. This congestion detracts from the recreational boating experience in much the same way as overused trails or crowded parks detract from upland recreational pursuits.

In addition, commercial fishing is adversely affected in several ways; navigation in crowded harbors is more difficult, inshore fishing and lobstering areas are less accessible, equipment is more frequently damaged or lost, and the overhead costs rise as the competition for moorage and berthing with pleasure boaters increases.

There is no doubt that boating pressure can have a negative impact on Maine's waterways. There is clearly a need to develop guidelines to address the concerns about congestion and adverse impacts upon the fishing industry. One goal of the proposed submerged land management program would be to develop such guidelines.

With a policy that recognizes the cumulative impacts of waterfront development, a marina that is determined to be an undesirable use in a given location would simply be prohibited. Reasons for undesirability may include a significant adverse impact on public access, marine resources, or the marine industry infrastructure that cannot be minimized through reasonable mitigation measures.

Construction of new marinas need not necessarily add to the congestion of the coast. Marinas offer a much more efficient method of storing boats than traditional moorings. If located properly, marinas could ease some of the congestion of crowded harbors and enable even more boatowners to store their boats in the water. Congestion could be further reduced through innovative methods of upland storage, such as "parking lot" arrangements or dry-stacking facilities that use cranes and other machinery to hoist boats in and out of

the water as needed. These facilities may, however, have higher overhead costs than conventional marinas.

The proliferation of marinas and the "invention" of dockominiums are marketplace responses to the tight supply of in-water boat storage space. The long waiting lists held by town harbor masters for mooring assignments are another manifestation of this phenomenon. The problem of allocation of space is not new and questions have been raised about the "fairness" of present allocation systems. It is uncertain what role the submerged land program should ultimately play in arriving at a solution. Even though the submerged lands belong to all the people of the State, it is not physically possible to allocate space for every individual boatowner. Recommending a method of allocation that is completely fair to all Maine citizens is beyond the scope of this study.

Merits of Dockominiums

1. Supply of berthing space

In Maine, as in the rest of New England, there is a high demand for berthing space and, in relation to demand, a low supply. This holds true for commercial fishing boats as well as pleasure craft. Most towns have long waiting lists for offshore mooring spaces and boat-owners from as far away as Massachusetts are in the market for berthing space in Maine harbors. This already high demand is expected to continue to rise.

Most of the sites suitable for docking facilities near major population centers are already occupied and development of new marinas on marginal sites is expensive and may require special environmental precautions. Therefore the potential to increase the supply of berthing space lies primarily in the expansion of existing facilities and through more orderly and space efficient docking arrangements. Construction of new facilities can be expected to proceed at no more than a moderate pace due to the constraints of cost, site characteristics, and requirements for environmental safeguards.

Dockominiums offer the potential to increase the supply of berthing space through creative financing arrangements that can enable existing facilities to expand or allow construction of new facilities on undeveloped sites where

traditional financing would be inadequate. The availability of more "up-front" money could enable developers to create attractive, efficient and environmentally-sound facilities to ease the berthing space shortage.

2. Maintenance of Facilities

Under the dockominium form of operation, costs of repairs, maintenance, replacements, dredging and environmental protection measures are spread among all leaseholders rather than a single proprietor. Funds are accumulated incrementally as part of the leaseholders' annual fees, thus eliminating the need for seeking additional financing for routine or even emergency funding needs. The result is that dockominiums have a greater funding base from which to operate. If the facility is well-managed, this additional funding can be used to insure stricter compliance with environmental and safety requirements. A cleaner, safer marina benefits the general public as well as leaseholders.

3. Distribution of littoral rights

Long-term leasing of a dockominium slip gives the leaseholder a portion of the littoral rights normally reserved exclusively for waterfront owners. Littoral rights, that is the right to wharf out and tie up one's boat, are private rights retained by the upland abutter, even though the submerged lands are public property. Dockominiums allow non-shorefront owners in the general public the opportunity to temporarily purchase rights that they would not otherwise be able to acquire.

4. Stability of prices and assurance of berthing space

Slip rental prices have been rising at an average rate of 15% per year in the eastern United States. By entering into a long-term dockominium arrangement, consumers are assured of a stable annual cost for docking their boats, at least for the duration of the lease. They are also assured that their space will be available in future years and they will not have to hunt and negotiate for new space due to changes in ownership or use of the facility.

5. Preservation of waterfront uses

Since a dockominium has many owners, all with a stake in seeing that the facility remains a marina, there is little chance that the marina will be converted to a non water dependent use. In the case of sole ownership, it is much easier for a potential developer to convince the owner to sell the facility for conversion to some other use. In addition, conversion to a dockominium may enable an existing but financially pressed marina to survive as a viable facility.

As marinas disappear, whether due to deterioration of facilities or conversion to non-water dependent uses, so do the associated services for fueling, repair, and marine supplies. Since all boaters depend upon these services, their preservation is beneficial to the general public. Because of the high costs of permit approval and construction, converting conventional marinas from seasonal rental facilities into dockominiums may in some cases be the only way to enable them and the associated support facilities to survive.

Drawbacks of dockominiums

1. Legal issues & consumer protection

Because they are a new phenomenon, dockominiums are not well understood. This occasionally leads to confusion as to what a dockominium is, and the misconception that the consumer is purchasing a parcel of submerged land. In fact, the only thing that is being purchased is a leasehold interest.

There are many different types of arrangements that could be considered "dockominiums" and the commitments and responsibilities of the different parties may not be clearly defined in all cases. These legal issues must be considered before a dockominium type lease is approved. Compliance with appropriate provisions of the Maine Condominium Act will help resolve many of these issues, but there are some that are peculiar to dockominiums. These include:

- Should the State, as Lessor, be exempt from the "leaseholder protection" provisions of the Condominium Act?
- Who does the Bureau deal with in case of failure of the association or default on lease payments?

- Since submerged land and the water above it cannot be sold, what is the consumer actually purchasing?

In addition, all marinas face a number of other critical concerns that consumers should be made aware of:

- What happens when natural disasters such as floods or hurricanes destroy the facility?
- Who is responsible for dredging, maintenance and repair of the facility?
- What limitations will exist on boat size?
- What areas will be open to public access?
- Who is liable for personal injuries to guests? the public?
- How will security for boats and private property be provided?
- How will waste disposal be handled?

Buyers must beware. There may be unscrupulous or uninformed developers who misrepresent what the consumer is getting. Comprehensive disclosure is necessary to ensure that consumers know what they are purchasing, what their liabilities and responsibilities are, and what uncertainties and problems they may encounter.

2. Costs to consumers

Conversion from a seasonal rental marina into a dockominium form of leasing usually results in greater initial expense for the consumer. This will drive some boat owners to new locations or out of the slip market. They may downsize to smaller boats that do not require in-water storage or they may leave boating entirely. Costs could escalate even further if investors engage in speculation in dockominiums in the hopes of making large profits.

A related consumer problem may be the unwillingness of lenders to provide bank loans for dockominium slips. This is due to the unfamiliarity of lending institutions with dockominiums, the relatively short term of the lease, and the uncertainty of the soundness of the investment.

Based on information from other states, many people who are willing to rent a slip on a seasonal basis are apparently willing to enter into a more long-term arrangement, despite the higher cost. In exchange they get

assurance of a space for the length of the lease, long-term price stability, and a greater say in the quality, maintenance, and operation of the facility.

3. Privatization of a public resource

There is an inherent conflict between the rights of the public to use submerged lands and the waters over them and the littoral rights of the private upland owner. This issue is much broader than the scope of this study and is likely to engender conflict as long as public trust rights and private littoral rights coexist. The only reasonable solution, as far as leasing of submerged lands is concerned, is to address each case on an individual basis and make certain that adequate provisions are made to protect both public and private rights.

Some dockominium leaseholders may desire exclusive use of a waterfront area. Experience in other states has shown that some concerns, such as overcrowded parking lots, theft and vandalism, and congested waterways are legitimate and should be addressed. However, there may be a tendency to attempt to exclude non leaseholding boatowners from using nearby portions of the waterway. Exclusionary measures that deny legitimate public access and navigation, or result in loss of services to the general public are unacceptable.

The privatization issue also includes the concern that large profits may be made from a public resource. Marinas, whether they are dockominiums or conventional operations, supply a desirable service to the public for which they should make a reasonable profit. Consumer protection measures may be needed to prevent speculation and fraud.

Related concerns; Seasonality versus permanence

Some temporary or seasonal structures are used for the same purpose as permanent installations and can be operated as a profit making marina or other commercial use in essentially the same manner as a permanent structure. Present rules require that a lease be obtained only when the structure is to be in place for at least 7 months of the year. However, non-permanent facilities still constitute private use of a public resource and those which are in place during the peak of the recreational boating season may interfere

with public access and contribute to congestion and other problems just as much as permanent structures. For example a marina that consists of floats held in place by pilings is considered permanent, even if the floats are removed during the off-season. A similar facility consisting of floats held in place by submerged anchors for less than 7 months is not considered permanent. Since the recreational boating season in Maine lasts only about 7 months anyway, seasonal structures are generally in use for the same period of time as permanent structures. Since such non-permanent structures occupy submerged land in essentially the same manner as permanent structures, they should be included in the leasing program. In order to require such structures to obtain a submerged land lease and in order to exempt those structures that truly are only temporary, the Bureau proposes to change the existing definition of "permanent" in the Submerged Lands Act from 7 months to

2. Conclusion regarding desirability of Dockominiums

Marinas, both conventional and dockominium, can help ease the shortage of slip space and, if properly designed, reduce some congestion in crowded harbors. If a marina is determined to be a desirable use in a given area, it must be well maintained and operated in an environmentally-sound manner. In some cases a dockominium-type financing arrangement may be the best way to achieve this objective. There are also a number of negative characteristics that make dockominiums undesirable, particularly those in which slips are sold. If legal and consumer protection concerns are adequately considered, dockominiums that are long term subleasing arrangements (i.e. leasehold marinas) are acceptable.

Proposed Bureau of Public Lands marina policy (including dockominiums)

In consideration of the positive and negative aspects of dockominiums, which are outlined in the body of the report, and concerns about marinas in general, the Bureau proposes the following new policy on marinas:

Leases:

A lease must be obtained for any marina that is in use for more than 2 months per year, regardless of the method used for securing the floats in place.

Lease rate will be based on fair market value. The method used to determine fair market value is described in the body of this report. Marinas that provide berthing space primarily for commercial fishing boats, that is have at least least 50% of their slips leased or rented year round to commercial fishing interests, will be charged the lower rate reserved for commercial uses of renewable aquatic resources. Marinas that provide slips primarily for recreational watercraft will be charged the water-dependent use rate.

Policies:

No slips may be sold. Slips may be rented on a seasonal basis or they may be subleased for a period of time not to exceed the terms of the principal lease.

No formal dockominium which requires the State to enter into a condominium arrangement and sign condominium documents may be formed. Sublessees may form any other legal association for the purposes of managing, maintaining, and operating the facility. Sublessees may choose to be governed by the provisions of the Maine Condominium Act so long as an actual condominium association requiring the State to sign condominium documents is not formed.

The principal leaseholder must be a legal entity; individual, partnership, or corporation. The principal leaseholder shall be the sole representative for any sublessees, renters, or other individuals with legal or proprietary rights in the marina in all matters pertaining to the terms and conditions of the lease.

The principal leaseholder must designate a specific individual with the responsibility and capability to respond immediately and independently to environmental emergencies.

Any services, such as fuel, supplies, or boat repairs that are available to renters or sublessees for a fee shall also be available to the general public for the same cost.

Marinas must have at least 5% of the total number of slips or spaces available for transient use and may charge a reasonable fee for such use.

In a leasehold marina, all sublessees must receive:

- A written explanation that submerged land and the waters above them are public property and cannot be purchased or sold.
- A copy of the permit issued by the permitting agency, including instructions for proper waste disposal and other environmental protection measures.

The general public cannot be excluded from walkways, piers, and boardwalks where ordinary foot traffic will not cause a safety or security hazard. The public may be excluded from work areas or other areas where foot traffic may cause a safety or security hazard.

KEY PUBLIC POLICY QUESTIONS

In conjunction with this study, several key public policy issues were identified for further discussion and were addressed by the Advisory Group. Although there was not complete agreement on every question, the following summaries represent a general consensus.

Is the Program, as defined in the study report, adequate to meet the State's responsibilities as steward and manager of Submerged Lands?

The program structure proposed in the report appears to be adequate to meet the state's minimum stewardship, management, and inventory needs. The group expressed some concern about the program's ability to handle the number of applications for leases and coordination with lease applicants and reviewing agencies. The Bureau's recommendation is to proceed with the proposed staffing level. This level represents a modest increase over current staffing, i.e. one additional position (submerged lands coordinator) spending full time on the submerged lands program and reassigning an existing position from part time to full time on the submerged lands program (submerged lands technician). Additional positions may be considered in the future if warranted by program needs.

Should lease fees return fair market value to the State?

Lease fees should return fair market value to the state. The base rate for leaseholders should be based upon the value of the submerged lands for the proposed (or existing) use. Fair market values should be adequate to cover the cost of the program; any surplus revenue should be used for providing public benefits that are in keeping with public trust doctrine. Potential projects include access acquisition, fish piers, and public boat launching facilities.

Should desirable uses be favored by reduced rental rates; if so, should BPL differentiate between different water dependent uses down to specific categories and should upland and fill uses be assessed at full fair market (i.e. upland) rates?

Desirable uses should be favored by reducing their rental rate to a percentage of the fair market base rate. The least desirable uses, those that require fill or could take place on the upland, will be charged the full fair market value if and when they are approved, or come out of the "constructive easement" status.

Should lease fees be structured on a regional basis to reflect different values of shore frontage along the coast?

The Advisory Group did not support the idea of structuring lease fees on a regional basis. There was general agreement that fair market value will vary with location, but the variability is too great to allow for averaging values within a region. Basing fee structure on local fair market value will eliminate the need to establish different average values for specific regions and local economy will be routinely included in the assessment process. The system to be used to obtain fair market value is proposed in the body of this report.

Should BPL require that public access benefits be included as a condition of a lease?

BPL should insure that public access or other public benefits that are in keeping with public trust doctrine are considered in every lease issued. Public safety must also be a consideration. Specific measures to provide public benefits may be required of lease applicants as a condition of the lease issued by the Bureau.

Should adverse impacts upon the marine resource infrastructure be a sufficient reason for denying a submerged land lease (or permit)?

The Bureau should clarify its authority to deny applications. Critical adverse impacts upon the marine industry infrastructure should be appropriate grounds for denying a project. The Department of Marine Resources, the State Planning Office, the Bureau of Public Lands, and the Department of Economic and Community Development/Office of Comprehensive planning should cooperate on a study of critical adverse impacts upon the marine infrastructure. Applicants will eventually be required to provide information on specific criteria to help in this determination. Other grounds for denying leases, such as cumulative impact, are covered by current statute, particularly the Coastal Policies Act, 38 MRSA § 1801.

Based on the information presented in the study report, should the State allow dockominiums?

There was no clear consensus on whether or not the Bureau should allow dockominiums on submerged lands. Dockominiums have both positive and negative aspects, as described in the report, and it is difficult to weigh all of them and come up with satisfactory balance. A proposed policy that covers all types of marinas, including dockominiums and non-permanent structures, is included in the text of this report. This proposal incorporates the positive aspects of dockominiums into Bureau policy and minimizes the negative aspects.

CONCLUSIONS

- * Current lease fees do not return fair market value to the state nor are they adequate to cover the cost of a submerged lands management program. Rental fees must be raised to achieve administrative and economic efficiency. They must return sufficient revenue to run a submerged lands program that manages the resource and protects access and public trust rights.

- * Public access over the waters of the state is a priority concern for the submerged lands management program. Congestion, undesirable uses, and the cumulative impacts of desirable uses are legitimate concerns of such a program. A need clearly exists for a program that will be actively involved with towns and other state agencies in planning for and managing submerged lands. Public trust doctrine and the Coastal Management Policies will be key elements of the management program. The Bureau will continue to specifically address access issues in its leasing and permit review policies.

- * The commercial fishing industry and its related service industries can be adversely affected by coastal development. Agencies must consider impacts on the marine industry infrastructure when reviewing applications. There is a need to address these concerns in greater detail. An additional study is recommended.

- * Dockominiums in which slip space is sold are not an acceptable form of marina ownership. Dockominiums in which slips are subleased in accordance with the proposed new marina policy are acceptable.

- * There is a need for the Bureau of Public Lands to clarify its standards and criteria for the approval or denial of submerged lands leases. The process to be used in determining approval or denial must be made clear to the public through active educational efforts.

RECOMMENDATIONS

1. Adopt the proposed new fee structure.
2. Create and fill the position of Submerged Lands Coordinator in the Bureau of Public Lands.
3. Create and fill a position to assist in the study of and to evaluate impacts on marine industry infrastructure in the Department of Marine Resources.
4. Adopt the proposed new policy on marinas which includes dockominiums and temporary floating marinas.
5. Adopt a new policy on non-permanent structures so that fees may be charged on temporary structures that occupy submerged lands for less than 7 months per year.
6. Register all existing structures under constructive easement, establish a registration fee, and begin a notification procedure to let current owners know that they will be required to obtain a lease or easement and pay appropriate rental fees beginning in the year 2005.
7. Develop policies for offshore developments that are not connected to any onshore facility.
8. Require BPL to develop or clarify criteria that will be used to review permit applications for concerns about public access, public trust rights, encroachment on abutters, and the placement of upland uses on submerged lands.
9. DMR, DEP, BPL, SPO and DECD should continue to study and develop the evaluation criteria for determining impacts upon marine industry infrastructure and to propose a method for incorporating consideration of these impacts into the leasing or permitting process.
10. Clarify DEP's responsibility to consider general cumulative impacts as required by the Coastal Policies Act, 38 MRSa ss1801.
11. Clarify BPL's authority to deny leases and to require compensatory measures as a condition of a submerged land lease.
12. The BPL will work with SPO, DECD, and communities to assist in planning developments that will affect submerged lands.
13. The State should actively support commercial fishing and marine industries by constructing or providing grants for private construction of essential infrastructure.

SUBMERGED LAND RESPONSIBILITIES OF OTHER AGENCIES

There are 7 major state agencies and 2 federal agencies that share responsibilities for managing some portion of the submerged land resources in Maine. In addition, every organized town in Maine has shoreland zoning laws, while those towns with harbors are also responsible for harbor management under the Harbormasters law. This distribution of authority can sometimes cause confusion for the general public. The State Planning Office's "**Coastlinks**" publication can help dispel some of this confusion and a strong effort should be made to distribute this publication to municipalities. In addition, the Office of Comprehensive Planning has prepared "**Coastal Management Techniques: A Handbook for Local Officials**" which contains guidelines for municipal efforts to implement the State's coastal policies. A smaller brochure, summarizing the activities of major State agencies is being prepared by The Bureau of Public Lands for widespread distribution. Table 6. summarizes the major responsibilities of each agency.

In the unorganized areas of the state, which includes many islands and remote lakes, the Land Use Regulation Commission is the principal regulatory agency; organized towns are regulated by the Department of Environmental Protection. A permit is required from one of these agencies for virtually any construction activity that takes place on submerged lands. However, before a permit can be issued, the applicant must obtain from the Bureau of Public Lands a valid lease or easement granting temporary legal right to use the state owned submerged land. These agencies are assisted in their review of permit and lease applications by the other agencies listed in Table 4.

Table 6. Submerged Land Management Responsibilities of Major Agencies.

AGENCY	AREAS OF RESPONSIBILITY
State Planning Office	
Maine Coastal Program	Planning and oversight of Maine's Coastal Policy Guidelines. Protection of working waterfronts, education.
Critical Areas Program	Inventory and protection for critical natural areas.
Department of Conservation	
Land Use Regulation Commission	Regulating activities on coastal wetlands, open tidal waters, great ponds, streams & rivers in unorganized towns. Building & Development permits.
Bureau of Public Lands	Protecting public access and public trust rights on submerged lands. Submerged land leases & easements.
Bureau of Parks & Recreation	Parks and public boat ramps.
Maine Geological Survey	Research, mineral exploration, mining, marine geology, beach erosion.
Department of Environmental Protection	
Regulating activities on coastal wetlands, open tidal waters, great ponds, streams & rivers in organized towns. Wetland Alterations permits.	
Department of Marine Resources	
Aquaculture promotion, marine research, education, and fisheries development. Aquaculture leases.	
Department of Inland Fisheries & Wildlife	
Management of endangered species, anadromous fish, seabirds & marine mammals.	
Department of Transportation	
Plan, develop, and maintain cargo ports, fish piers, and ferry services.	
Department of Economic & Community Development	
Office of Comprehensive Planning	Financial and technical assistance to regional councils and municipalities for land use planning and growth management.
Army Corps of Engineers	
Navigational improvements & dredging.	
US Coast Guard	
Navigational hazards & ocean rescue.	
Municipalities	
Comprehensive planning, zoning, growth management. Local building permits.	
Municipal harbormasters	
Mooring assignments & harbor management.	

ELEMENTS OF THE STUDY

The findings, conclusions, and recommendations of this study were obtained through a cooperative effort of the Bureau of Public Lands/Department of Conservation, the State Planning Office, and the Department of Marine Resources. They were assisted by an Advisory Committee representing commercial fisheries, waterfront development, recreation, coastal protection, marine law, and the state legislature. The Departments of Environmental Protection and Transportation, the Office of Comprehensive Planning, and the Maine Geological Survey also contributed information and responded to inquiries from the study team.

The Bureau of Public Lands surveyed other states for information about their own submerged lands programs and attended several key conferences to gather additional information:

- the National Dockominium Conference in New Jersey,
- the National Submerged Lands Conference in North Carolina, and
- the Gulf of Maine Conference in Portland, Maine.

These efforts have been very successful; information about submerged lands and related issues has been acquired from 20 states and Canadian provinces.

ACKNOWLEDGEMENTS

The following persons participated in committee meetings, reviewed and commented on report drafts, and kindly contributed their time, insight, and a great deal of valuable information to the submerged lands study as members of the Advisory Committee:

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SUBMERGED LANDS STUDY TEAM

The following representatives of the Bureau of Public Lands, State Planning Office, and Department of Marine Resources formed a working task force to conduct research, discuss issues, outline the study, and prepare the report.

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