

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date January 7, 1975

To William R. Adams, Jr., Commissioner Dept. Environmental Protection
Spencer Apollonio, Commissioner Marine Resources
From Cabanne Howard, Ass't Attorney General Dept. Attorney General

Subject Wetlands Act

The Department of Marine Resources has asked two questions regarding the Wetlands Act, 12 M.R.S.A. §4701 et seq. Both relate to Department of Environmental Protection handbook, Protecting Your Coastal Wetlands, which defines three kinds of marshes which it considers to be wetlands, and describes various kinds of vegetation which it implies are exclusively indigenous to each kind of marsh. Marine Resources asks, assuming the handbook's definitions of the three areas to be true, whether such areas are in fact wetlands as that term is defined by Section 4701 of the Wetlands Act, and whether the existence of such marshes be proved by reference to vegetation as well as by reference to tidal action.

1. Applicability of Wetlands Act to Salt Marshes and Transitional Marshes. Section 4701 defines a wetland as

" any swamp, marsh, bay, beach, flat or other contiguous lowland above extreme low water which is subject to tidal action or normal storm flowage at any time excepting periods of maximum storm activity."

The Department of Environmental Protection handbook, Protecting Your Coastal Wetlands (May, 1974) describes three kinds of marshes which it considers to be wetlands within the meaning of the statute. The low salt water marsh is defined as marsh which is covered by the tide twice daily. The high salt water marsh is defined as marsh which is subject to tidal action several times each month. Both of these are thus clearly "subject to tidal action or normal storm flowage at any time excepting periods of maximum storm activity." Only the third kind of marsh, the transitional marsh, presents difficulties, since it is not subject to any regular tidal action. The handbook, however, describes such a marsh as being "affected by only the maximum

tides," which would appear to be closer to the statutory phrase "normal storm flowage," implying as that does some kind of tidal action, rather than the statute's exclusionary phrase "maximum storm activity" (all emphasis added). Thus the transitional marsh may be considered a wetland for purposes of the Act.

2. Determination of a wetland by vegetation sampling as well as by tidal observation. The Department handbook describes various kinds of vegetation which are indigenous to each of the three kinds of salt water marsh. Id. at 9-13. Assuming what is implied by the handbook, that each of these species may be found only in the type of marsh in which the handbook places it, it can be said that, provided that the necessary expert testimony can be produced at trial, the existence of tidal action may be inferred by the introduction and identification of vegetation found on the land in question. It should be added that in most cases, particularly those of the low and high salt water marshes, such a procedure should not be necessary; eyewitness testimony regarding the activity of the tide should be much easier to obtain. But in such cases as when filling of what is thought to have been a marshland has occurred and the tide has therefore been impeded, or when the transitional zone (where tidal activity is by definition infrequent) is involved, proof of the existence of a wetland may be attempted in the manner described.



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