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COASTAL ZONE MANAGEMENT IN MAINE:
A Legal Perspective

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Coastal Planning Group

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COASTAL ZONE MANAGEMENT IN MAINE: A LEGAL PERSPECTIVE

by Harriet Putnam Henry[1]

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INTRODUCTION

Coastal Zone Management in Maine: A Legal Perspective focuses on the potential role and responsibilities of Maine state government in Coastal Resources Management. This report summarizes the legal status of Maine's activities in Coastal Management, explains the possible effects of the new Federal Coastal Zone Management legislation and suggests additional state actions that might be needed. A companion report on the status of the natural and economic resource aspects of Maine's Coastal Zone Management program will be forthcoming in the next few weeks. Both of these documents will go a long way towards preparing the framework for appropriately managing the state's coastal resources.

In view of the growing need and the federal push into this field it is hoped that Maine's pioneering efforts can continue and will prove useful in developing institutional arrangements in other states. Our approach towards Coastal Management closely reflects the state's unique heritage and aptly demonstrates the complexity and individuality of a state's interests and needs.

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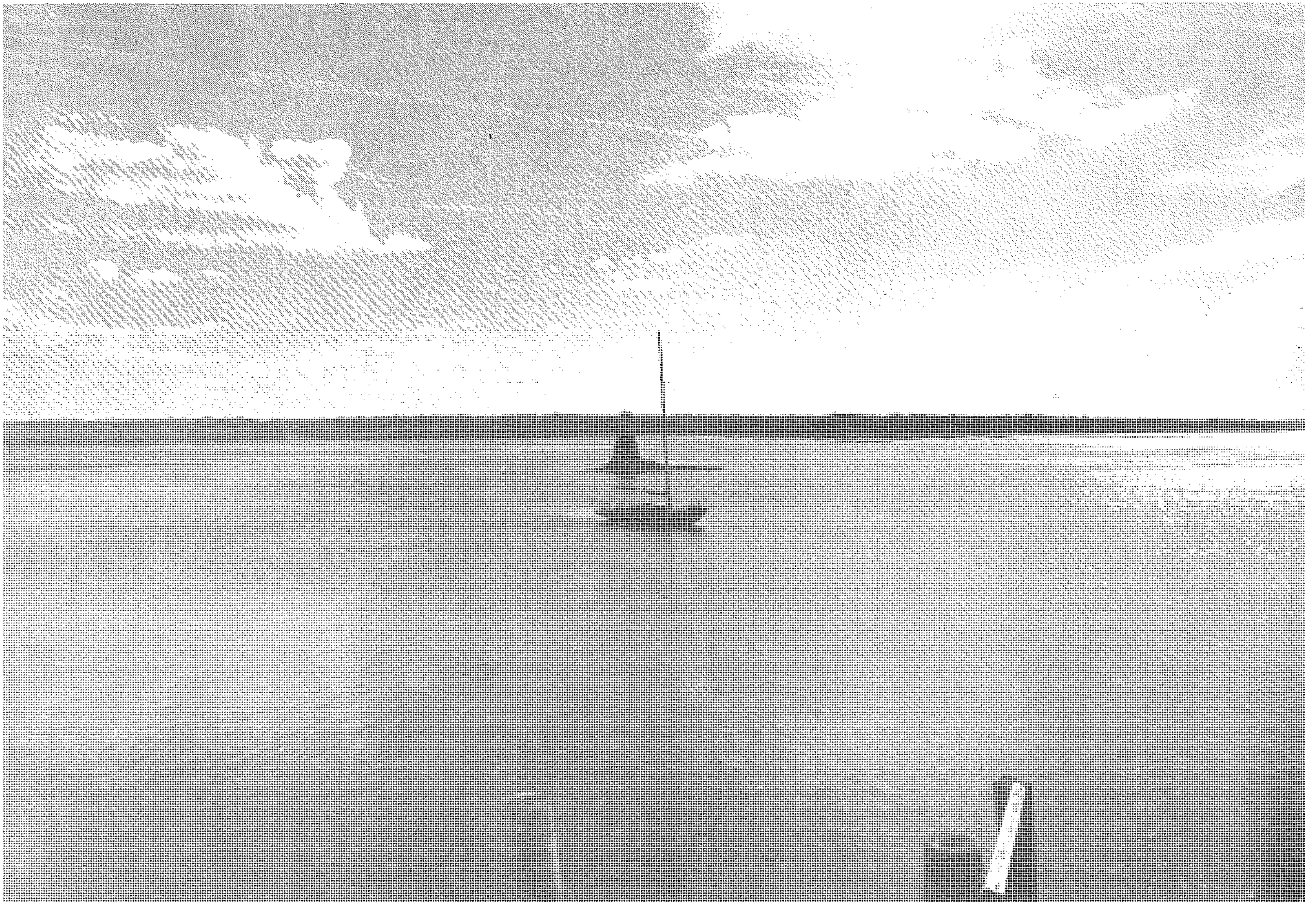
I. SAVE THE MAINE COAST



Save the Maine Coast! Preserve Coos Bay![2] Save our Shore! California Coastal Coalition.[3] Citizens Who Care. A flood tide of public awareness of the increasing pressures on the coast has been evident nationwide. It has resulted in popular support for government intervention to prevent further degradation and to preserve still undeveloped or relatively unscathed stretches of shore line. This tide has been nurtured by first generation environmentalists such as the Nature Conservancy, the Audubon Society, and the Sierra Clubs; it has been reinforced by eternal pragmatists armed with such slogans as "Balance Industry with Agriculture" evident in Mississippi in the 40's and "Development through Conservation" which emerged in Maine in the 60's; it has been enhanced by the confluence of the environmental movement with the youth culture; and finally, it has been assisted by the national focus on oceanography. The work of the Stratton Commission during 1967-68[4] culminating in the publication of *Our Nation and The Sea* and the creation of the Sea Grant Program in 1966[5] provided both the prespective and limited funding to enable the nation and individual states to look anew at their ocean resources. The Federal focus on the ocean was further sharpened in 1970 by the establishment of the National Oceanic and Atmospheric Administration (NOAA) designed to bring together in one agency many federal programs concerned with ocean resources.[6]

The recent, as well as the eternal, lure of the sea is twofold. One aspect is the call to explore and exploit the renewable and nonrenewable resources of the ocean depths. It includes the possibilities of utilizing water areas and submerged land as prime real estate for development. This position is forcefully articulated by one of the founding fathers of the Sea Grant Program, Athelstan Spilhaus, who is also extremely realistic about the magnitude of the commitment and investment necessary to make significant strides in inner space.[7] The other aspect is a heightened realization of the potential and pricelessness of the coastal and near shore environment and recognition of the compelling urgency to regulate activity in the coastal zone.

It was not until 1972, however, that Congress passed the Coastal Management Act of 1972,[8] which authorized assistance to states in planning for and administering sound management programs for this "Acre of Diamonds"[9] in the "Decade of Ocean Exploitation."[10] The basic philosophy of the Federal Coastal Zone Management Act is that decision making on the use of the coastal zone is basically a state perogative subject to the overriding national interest in such areas as navigation, deep water ports, and the production of energy. The approach is the carrot rather than the stick; the legislation is designed to act as a catalyst for state action and initiative by making funding available for coastal management if and when a state meets minimum federal guidelines. The activation of this catalyst was delayed, however, because funds were not included in the President's budget, despite congressional appropriation. While such delay does not detract from the basic merits of the act, it does dramatically illustrate a state's predicament in relying too heavily or solely on the shifting sands of federal financing.

As with other coastal states, Maine's involvement in coastal management,[11] although not labeled as such, predates the passage of the Coastal Zone Management Act of 1972. Maine has both contributed to and borrowed[12] from the store of

creative and imaginative legislation enacted to regulate the marine environment. The Mandatory Shoreline Zoning and Subdivision Control Act,[13] hereinafter referred to as the Maine Shoreline Zoning Act, is one of the most recent Maine enactments in the field. The adequacy of the Maine Shoreline Zoning Act and other environmentally oriented legislation in furthering Maine's determination to preserve the integrity and beauty of its coastal environment will be discussed below. Recommendations as to possible approaches to an effective coastal management program and needed additions or modifications in present Maine law will also be suggested.

FOOTNOTES

1. A.B. 1945 Smith College; J.D. 1954 George Washington University Law School. Member of Bars of Maine, Virginia and District of Columbia. Formerly coastal law consultant. Research Director for and principal author of *Maine Law Affecting Marine Resources*, Office of Sea Grant Programs and the University of Maine School of Law, 1968-70. Appointed a Judge At Large of the Maine District Court September 1973 and assumed duties October 15, 1973. Research for this article was supported in part by the Maine State Planning Office, Coastal Planning Group, but views expressed are those of the author.

2. See *Natural Resources, Ecological Aspects, Uses and Guidelines for the Management of Coos Bay, Oregon*, U.S. Department of Interior, June 1971.

3. California citizens committee that organized and successfully passed initiative legislation in California to create regional coastal management authorities. See Division 18 Section 27000 of the Public Resource Code; California Governmental Code.

4. Julius A. Stratton, Chairman, Commission on Marine Science, Engineering and Resources established by Public Law 89-454. The Commission published as its final report Our Nation and the Sea, and three Panel Reports. Government Printing Office, 1969.

5. National Sea Grant Colleges and Program Act of 1966. Public Law 89-688; 80 Stat. 998; U.S.C.A. 1103, 1304, 1107-8, 1121-4.

6. NOAA was created on October 3, 1970, Executive Reorganization Plan No. 4, July 9, 1970 pursuant to provisions of Chapter 9 of the U.S. Code.

7. See *Bountiful Grants from the Sea*, Athelstan Spilhaus, Chairman of the Board of Governors of the Oceanic Educational Foundation. *The Saturday Evening Post*, September-October 1973, p. 70.

8. Public Law 92-583: 86 Stat. 1280. Proposed Rules, 15 CFR, Part 960 Coastal Zone Management Program Development Grants, Federal Register, Vol. 38, Number 113, Wednesday, June 13, 1973.

9. Reference is to the story by Russell H. Conwell about a man who searched the whole world for diamonds. Shortly after drowning himself in despair about the futility of his search, the new owner of his farm discovered a productive diamond mine in the back yard. Conwell, R.H., *Acres of Diamonds*, Harper & Brothers Publishers, New York and London, 1915.

10. Proclaimed by President Johnson in March, 1968. See Vol. II *Maine Law Affecting Marine Resources, Office of Sea Grant Programs and University of Maine School of Law,* 1969-70. p. 173 (Hereinafter referred to as *Maine Law Affecting Marine Resources.)* Maine's intense interest in oceanography was augmented by the appearance of the Vice President, Hubert Humphrey, at a Bowdoin College forum in 1967. See: *New York Times*, Nov. 30, 1967, p. 1-6.

11. See Henry, H. P. and Halperin, D.J., Volumes I-IV, *Maine Law Affecting Marine Resources.*

12. Plagarize might be a more fitting description. An analysis of the progression of statutes from one state to another would indicate that there is nothing new under the sun — only the way it is used. Hawaii was the first state to institute state-level zoning (Act 187-1961, The State Land Use Law of 1961, Chapter 98-H, Chapter 128, Section 9.2 of the Revised Laws of Hawaii, 1955.). Similar types of zones were adopted by Wisconsin and then Minnesota in their shoreline zoning statutes. Section 22, (Shoreline Zoning), of the Water Resources Act of 1965, Act 614-1965, Section 59.971 of the Wisconsin Statutes, Chapter NR115 (Wisconsin's Shoreland Management Program) of Wisconsin's Administrative Code.; Act 777-1969 (Regulation of Shoreland Development). Sections 394.25, Subdivision 2; and 396;03 Minnesota Statutes; Minnesota State Regulations, Chapter Six: Cons 70-84). Massachusetts was a pioneer in wetlands legislation (Chapter 130-Section 27A as amended, Massachusetts General Laws), which was duly copied by Maine (12 M.R.S.A. 4701-4711, 12 M.R.S.A. 4751-4758). Maine was heralded as unique in its Site Location Law (38-M.R.S.A. 481-488, 1970) but could have been influenced by Oregon's Nuclear Siting Task Force (Governor Tom McCall, Executive Order December 11, 1969) and transmitted the idea to Maryland (The Power Plant Siting Act (Act 31-1971)). Florida has borrowed Maine's Coastal Conveyance of Petroleum Act (38 M.R.S.A. 541-557) and conveniently had its constitutionality tested, *Askew v. American Water Ways Inc.* 36 L. Ed 2d 280, 83 S. Ct. (1973). Florida has borrowed performance standards from Washington (Final *Guidelines Shoreline Management Act of 1971*, State of Washington, Department of Ecology, June 20, 1972) which appeared only slightly transformed in *Recommendations for Development Activities in Florida's Coastal Zone*, (Coastal Coordinating Council, Department of Natural Resources, State of Florida, April, 1973). Recommendations in this article borrow heavily from ideas encountered in literature from Florida, Washington, Minnesota, California, and the Adirondak Park Land Use and Development Plan.

    A cardinal rule of plagarism of this sort is that the statute of the other jurisdiction must fit the circumstances and legal framework of its adopted state. It is strange to read the Maine phrase in the Florida Statute about keeping the pristine condition of the coast intact (Florida Oil Spill Prevention and Pollution Control Act, L-Fla-1970, C-70-244) but it probably startles researchers in Texas even more to find language from the Texas Railroad Company Oil Statute appearing in Maine Law. (See 10 M.R.S.A. 2151-2166) which has no oil or gas exploitation to date.

    There is now an abundance of laws and literature in the field of coastal zone management and the repositories of this expertise, i.e. New England Marine Resource Information Program, University of Rhode Island, the University of Michigan Sea Grant Program; The Florida Coastal Coordinating Council, and the Minnesota Department of Natural Resources, are generous in making it available. The sheer bulk of available materials, however, calls for selectivity in retrieving applicable information.

13. 12 M.R.S.A. 4811-4818 as enacted by P.L., 1971, c. 535 and amended by P.L., 1971, c. 618, c. 622; P.L., 1973, c. 564.

II. SAVE THE MAINE COAST — FOR WHOM?

Save the Maine Coast for whom? For what? How? The answers to these basic questions must be taken into consideration in designing any coastal management program for Maine. In seeking such answers one is confronted initially and continually by common aims, conflicting priorities, and contradictions. Paradoxes are abundant as policy makers attempt to reconcile the economic, ecological, social and emotion aspects of each decision. Regulatory measures designed to accomplish certain objectives have often had a diametrically opposite effect.[14] The very success of some coastal priority projects has been their own nemesis.[15] Rhetoric has helped crystalize public support for environmental management where scientific explanations would have left the general populace untouched. But oratorical overkill has often resulted in substituting a slogan for a solution. This has tended to obscure the complexity of a problem, its ramifications, and lessen the public's willingness to commit the resources necessary for its resolutions.[16]

The answer to the question for whom and for what to save the Maine Coast evokes as many variations in answers as the persons questioned. The visceral reaction is worthy of Rousseau romanticism in which the noble savage, in this case a Maine citizen, lives in harmony with his environment along the rockbound coast of Maine — a coast bathed in sunlight or shrouded in fog but unscathed by the bulldozer, industry, clear cutting, or other intrusions on the natural environment such as smoke stacks, refineries, heavy industry, litter, asphalt jungles or hot dog stands. Fullest recreational advantage is taken of these resources in boating, sailing, swimming, or just walking in solitude along the shore. The fishing industry is thriving and any reactions to nonaesthetic side effects of fish processing are dulled by picturesque fishing vessels and colorful lobster buoys. Seaports that have handled Maine's historical coastal trade are thriving without any thought being given to cargo, balance of trade, or industries for which such cargoes are destined.

This romantic vision is worthy of a state that has been richly endowed with unique natural resources and a priceless heritage of scenery and beauty. In many areas of Maine the vision still corresponds with reality. The relatively static population and the southern migration of the textile mills which, by and large, have not been replaced by other industries have given Maine a breathing space from the development pressures evident in many coastal states. The quality of life as measured by environmental standards and opportunity to enjoy natural resources has been high. Now the very character of the Maine coast, as well as Maine itself, is being threatened by these same pressures for industrial sites and recreational retreats for urban weary wanderers. The end of the Age of Innocence has been marked by a legislative determination to regulate development in Maine. Most of the ensuing laws have been directed toward the coastal zone although their effect is applicable statewide. An examination of the language of some of these statutes is useful in determining legislative intent, as opposed to legal efficacy,[17] as for whom the Maine coast should be saved.

In an Act to Regulate Site Location of Development Substantially Affecting Environment,[18] the duties of the Environmental Improvement Commission (now the Department of Environmental Protection) were amended to make the agency responsible for

"exercising the police powers of the State to control, abate, and prevent

> the pollution of air, waters and coastal flats and prevent diminution of the *highest and best use* of the natural environment of the State."[19] (Emphasis added)

Under specific provisions of that Act, hereinafter referred to as the Site Location Law, the Legislature made a finding

> "that the economic and social well being of the citizens of the State of Maine depend upon the location of commercial and industrial developments with respect to the natural environment of the State."[20]

In an Act relating to the Coastal Conveyance of Petroleum, the Legislature[21] defined what it considered the highest and best use of the coast:

> The Legislature finds and declares that the highest and best uses of the seacoast of the State are as a source of public and private recreation and solace from the pressures of an industrialized society, and as a source of public use and private commerce in fishing, lobstering and gathering other marine life used and useful in food production and other commercial activities.
>
> . . . preservation of these uses is a matter of the highest urgency and priority and that such uses can only be served effectively by maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests with the least possible conflicts in such diverse uses.[22]

"Highest and best use" in the two statutes does not bear the same legal connotation that the phrase carries in condemnation proceedings[23] but rather reflects the recognition of the need for the State to intervene in balancing the public interest in the environment against the demands of the marketplace. Common throughout other environmental legislation is the insistence on the preservation of natural beauty.[23a] This directive is seldom an independent criteria but is linked with more objectively measurable criteria such as soil suitability, water quality, and air purity. In strictly environmental and coastal management laws, the Legislature has never affirmatively advocated the appropriation of the Maine Coast for industrial use except for food production based upon renewable marine resources.[24] The Site Selection Law, however, implicitly recognizes the necessity for the existence of such industry in requiring that siting of commercial and industrial developments have a minimum adverse effect on the natural environment.[25] Although the Federal Coastal Zone Management Act gives environmental values priority, it requires "that economic considerations and the siting of facilities necessary to meet requirements which are other than local in nature" must be integral parts of a state's coastal management program.[26] Similarly the coastal or shoreline management programs of other states have not been reluctant to endorse, or at least pay lip service to, economic and development objectives.[27]

Economic considerations are mentioned in other more general legislation that directly or indirectly relate to the Coast. Economic implications must be considered by the Maine Department of Transportation in establishing scenic highways.[28] Similarly, that Department's responsibility to acquire, construct, operate,

and maintain such harbor facilities as may be necessary to implement the planned development of coastal resources and harbors, implies industrial development.[29] Progress in fulfilling this mandate is currently under way.[30] While Maine has been constantly courted by various oil companies, the State's flirtations as evidenced by the proposed foreign trade zone at Machiasport[31] and the proposed Maine Industrial Port Authority,[32] presumably designed to facilitate the construction of an oil refinery at Eastport,[33] have yet to ripen into a lasting relationship.

The proper role of economic considerations in environmental zoning is a question which must be met head-on, not only to bring Maine law in compliance with the Federal Coastal Management Act, but also to assure the continued broadest based public support for environmental and coastal management legislation. The Department of Environmental Improvement, however, has consistently refused to consider economic implications [34] in its administration of the Site Location Law insisting there is clearly no legal requirement to do so. This refusal was challenged in *Maine Clean Fuels* v. *Environmental Improvement Commission*[35] on the theory that the legislative history of the act, gubernatorial pronouncements, and the fact that the Site Location Law is "in the nature of zoning" and thus must take economic welfare into consideration as part of the general welfare.[36] The merits of the challenge were ignored in the decision of the Maine Supreme Judicial Court.[37] Whatever the original intent, the present disposition of the Legislature is reflected in its refusal to adopt amendments in the 106th Legislature that would have required economic considerations.[38] In the last regular session the Legislature not only rejected this proposed amendment, but also, in its ultimate wisdom, amended the Maine Shoreline Zoning Act to allow only environmental criteria if the municipality zoned only the minimum 250 feet required under the Act.[39] Perhaps an even more inexplicable action of the 106th Legislature was an amendment to the Title 30 Municipal Regulation of Subdivision Law,[40] the relationship of which to the Maine Shoreline Zoning Act is at best unclear, that repealed a criterion for municipal approval of subdivision proposals. The criterion had provided that it must be shown that a subdivision

> "will not place an unreasonable burden on the ability of local governments to provide municipal or governmental services."[41]

This deletion could dilute a municipality's ability to refuse to approve a residential subdivision because of the economic consideration of the additional cost to the municipality in providing services as opposed to the anticipated revenue from the new subdivision. Thus paradoxically, the elimination of a subsection from this environmentally oriented section will result in greater pressure on the land the statute sought to protect.

In other jurisdictions subdivision approvals have been denied, with judicial approval,[42] on the basis of the inability of the municipality to provide such services or approval has been conditioned on the developer providing these services at his own expense.

The failure to consider economic implications is now being aggressively challenged by many wage earners and most labor unions of Maine who see environmental laws, particularly the Site Selection Law, as an obstacle to an opportunity for employment or upgraded employment.[44] The labor unions have consistently

testified as proponents for proposed refineries and have more recently expressed concern that subdivision constraints are slowing down construction activity that is so vital to their livelihood. These challenges, it is submitted, do not imply a lack of sensitivity to the importance of preserving ecological integrity or natural beauty but a strident questioning as for whom the Maine Coast is being saved. Such questions note the paradox of summer residents, who have made their fortunes in oil or other heavy industrial enterprises, in the forefront in financing opposition to any development that might pose a threat to their adopted paradise.[45] But it should be noted, the citizen of Maine must also have the economic opportunity to remain in paradise.

The insistence on giving consideration to economic implications does not mean that economic factors should be paramount or that the public interest should be sacrificed or subordinated to the dollar sign. It does mean that there must be some trade offs.[46] But even when such trade offs result in alteration of the pristine condition of some portions of the coast, such development should still be subject to environmental restrictions. If economic considerations continue to be ignored, the environmental overkill, may destroy a large segment of public support for environmental laws which are even more necessary now than when they were first enacted.

Many, however, feel that the Site Location Law would be unmanageable if required to consider economic considerations along with environmental values on a case by case basis and that the balancing of economic and environmental concerns is ostensibly a goal of planning programs and not one that can be met through a law which essentially recognizes certain environmental values and seeks to protect them. The merits of this arguement deserve careful consideration as well.

Housing-Subdivision Access

The paradoxes discussed in the economics of industry v. the environment are also apparent in other coastal uses. The desirability of and the demand for shore front property for housing or residential subdivisions needs no documentation. But this very demand coupled with minimum lots size,[47] minimum setback,[48] and minimum shore frontage restrictions[49] has made coastal real estate prohibitive for moderate or low income housing. As far as it has been possible to ascertain, no one has as yet challenged shore front environmental restrictions as exclusionary zoning,[50] but this is certainly the effect if not the intent of such ordinances. Even if a challenge along these lines never materializes, serious thought should be given to the consequences of residential subdivisions cutting off access to the ocean for the general public. Subdivision ordinances that require access and minimum shore frontages to be enjoyed in common for dwellers in the subdivision are fairly common.[51] Not yet in vogue is the recommended policy of requiring subdivision developers to provide public access when a subdivision development occupies substantial portions of coastal lands previously enjoyed by the community.[52]

Fisheries

One of the prime aims of environmental coastal management legislation is to

protect marine fisheries and the ecological integrity of spawning grounds and habitats. It should be noted, however, that measures to manage fisheries to attain maximum sustainable yield and to assure a reasonable livelihood for the fisherman have lagged behind the concern for fishery habitats. The industry has been plagued by competition from foreign fishing fleets and has not yet realized an aquaculture potential predicted to be possible for Maine.[53] Paradoxically, aquaculture, hailed as a prime alternative to industry for the Maine Coast has been welcome more in the abstract than in the actuality by fishermen who fear exclusion from traditional fishing areas and shore front property owners who do not relish aquaculture structures or floating crates in front of their own frontages. The 106th Legislature has directed its attention to marine fisheries in the creation of the Department of Marine Resource which is basically the old Department of Sea and Shore Fisheries but endowed with more authority and flexibility to assist the fisherman and conserve marine species.[54] For the first time the Commissioner has been given meaningful power to lease coastal land and water areas for aquaculture.[55]

Recreation

The greatest paradoxes are to be found in the legislatively preferred use of the Maine Coast for recreation. The recreational industry of Maine has been historically promoted not only as the highest and best use of the coast in the aesthetic sense but for economic returns inuring to the State.[56] The Department of Commerce and Industry, while promoting the four season concept, has raised some serious questions about the relative advantages of a seasonal low wage industry for a State with an already low per capita income.[57] Now, even the magnitude of the total economic contribution to the State has been challenged on the basis of the validity of the figures which have reported the economic benefit of the recreational industry.[58] The latest touch of irony is the concern expressed this past summer about the possible effect of the alleged gasoline shortage on the Maine Tourist Industry — an industry promoted to keep oil out of Maine.[59]

From the point of view of coastal management, the runaway success of the recreational industry is of more concern to the State than inadequacies of or inaccuracies in reporting the economic benefits of recreation. The problem of success of tourism is magnified in fragile ecological areas that can be destroyed by too intensive use or in areas whose primary attraction is their remoteness and wilderness status. Hikers' boots are steadily pulverizing the path to Chimney Pond which is part of the grandeur that is Mt. Katahdin, the Appalachian Trail is often crowded, and the solitary stroller on the deserted Maine beach has found that his favorite haunt has become a busy thoroughfare.

Bumper-to-bumper traffic on the Maine Turnpike that in summer has backed up to the New Hampshire Turnpike toll booth is not unusual; wall-to-wall campers[60] or "no vacancy" signs at State Parks are common; massive hordes abrogate the solitude and renewal sought from the park atmospheres; increasing social and economic costs in the form of litter, demand for services such as sewage, solid waste disposal, policing, congestion, and the wear and tear on existing municipal services are being recognized.[61] The appearance of such organizations such as

KPOOM[62] (Keep People Out of Maine) does not represent a major movement, but it is reflective of similar trends in such states as Michigan,[63] Vermont,[64] and Oregon[65] that are now looking askance at a tourist trade they once eagerly sought and are taking steps to curtail state financing of such developments as ski slopes and other recreational developments.

Universal Recreation

Sailing and cruising the picturesque coast is part of the idyll as well as the reality, but although pleasure boating is extensive in Maine, it certainly is not a universally enjoyed recreational outlet. Saving the Maine Coast for this activity serves a restricted segment of the population. Furthermore, pleasure boating may interfere with commercial fisheries or aquaculture enterprises; fish and wildlife habitats' may be damaged by the construction of marinas or wakes of motor boats.

Perhaps the recreational uses of the Maine Coast that can be most universally enjoyed are unobstructed viewing from scenic highways or strategic lookouts; camping or picnicking along the shore, walking along the water's edge, be it on rocky promontories or stretches of sandy beach; bathing, swimming, and surfing, or merely enjoying the solitude of a secluded area untouched by the intrusions of man. In the final analysis this is the Coast of Maine that must be saved by environmental and coastal management legislation. The citizen of Maine, however, needs reassurance that the legislation he has supported to protect this heritage will also guarantee that he will not be deprived of its use.

The rhetoric of recreational use of the Maine Coast is universally applauded, but in reality there is very little access to the Maine Coast for citizens of Maine and the El Dorado of tourism has produced somewhat tarnished gold at the end of the rainbow.

Legislative intervention to lessen the pressures of population[67] is not politically feasible, even if it were morally acceptable, so municipalities and states have grappled with the problem of regulating the flow of larger numbers of people with increased leisure time. One possible solution is restriction of admittance to recreational areas to protect the recreational resources found therein.[68] In practice preference is given to residents and, in the case of some municipalities, non-residents are excluded all together. This practice has been attacked in several jurisdictions[69] and similar attack may reasonably be anticipated in Maine. The legal basis of the attack is, of course, the privileges and immunity clause[70] and the equal protection clause of the United States Constitution. The privileges and immunities objection was successfully overcome to uphold the constitutionality of Maine clam ordinances that prohibited other than residents from harvesting shellfish on municipal flats.[71] The rationale was that for purposes of conservation some limitation on harvesting of shellfish must be made and the limitation to residents was a reasonable limitation.[72] It is doubtful that a similar arguement on exclusion from recreational areas would be as equally successful either from a constitutional point of view or in the face of federal largess in providing monies for state and municipal park acquisition.

Another solution is the acquisition of more public parks and publicly owned shoreland. A four million dollar bond issue for this purpose was enacted in 1967[73]

and subsequently ratified by the voters. Strings were attached, however, to the effect that no money from this bond issue could be used for property that was taken by eminent domain.[74] A three million[75] dollar bond issue was approved by the 106th Legislature and was ratified by the voters in November, 1973. This bond issue had no similar restrictions. The mounting public clamor for use of beach property is illustrated by the recent action of the Biddeford City Council in starting condemnation proceedings against prime recreational frontage belonging to the Biddeford Pool Association[76] and the formation of "Land for Maine People"[77] to support the proposed bond issue.

It was estimated in 1968 that only 34 miles of Maine shoreline with recreational potential was in public ownership[78] and since then only small increments have been added to this figure. Maine is surely warranted in increasing the proportion of public to private land holdings, but even the most extreme environmentalists would not advocate that the whole coast of Maine be one giant park. Public ownership per se, however, does not guarantee use of the Maine Coast for its citizens unless the requisite resources are available for development and operation. Land that is in public ownership that is not used increases the pressures on other public lands or the remaining private lands. The same is true of coastal properties acquired by private conservation groups[79] who in the name of preservation may remove similar stretches of the coast from public use and in the process make adjacent private property even more valuable and prohibitive to the average citizen of Maine. The propriety of non-public ownership of large portions of land held or manipulated for the public interest but beyond the control of the sovereign power raises philosophical questions of elitism, who decides the greatest good for the greatest number, and so forth that are beyond the scope of this inquiry.[80] What is strictly relevant, however, is the questions as to whether public or private management of recreational areas is preferable. The State of California[81] has made its choice and as a matter of policy has opted for private management of recreational areas. Such policy, while effective, has been criticized where private management has resulted in the exclusion of public access to the shore.[82]

A fourth alternative is to provide greater access to the Coast for Maine citizens but still retain the major portion of the coast in private ownership. There is a public servitude of navigation and fishing in the area between high and low water mark which was imposed by the Colonial Ordinances of 1641-47 at the same time that private ownership of the intertidal zone was made possible.[83] This intertidal land was incapable of private ownership under English common law and in many states ownership still stops at the high water mark.[84] The practical effect is similar in most states, however, whether private ownership stops at high or low water mark. In states in which the intertidal zone is in private ownership, the land is impressed with a public servitude; in states that ownership stops at high water mark, the riparian owner is granted certain prerogatives and preferences not granted the general public.[85]

In Maine the public has been accorded broad rights in the intertidal zone. Some of these rights include sailing over flats, resting a vessel on the flats when the soil is bare, mooring vessels on the flats during the change of tide, taking on or discharging passengers, crossing flats to go to or from a boat or to "other men's

houses."[86] The Supreme Court of Massachusetts[87] has denied the public the right to bathe on the flats, as is the English interpretation[88] of the public servitude. The Maine Supreme Judicial Court has never ruled on this point but in its statement "In the pursuit of his private affairs, of business as well as pleasure, the defendant has the right to land on the flats"[89] might indicate that the Maine Court would be sympathetic to this activity. To take advantage of these public rights, whether it be in a high tide or a low tide state, the public must be in the intertidal zone legally,[90] either by gaining access from the ocean, from a public way, or by leave of a riparian owner. The Colonial Ordinances did not grant the same right of access to the ocean as it did to great ponds.[91] The right to use the intertidal zone is fine once you have gained legal entry, but time and tide wait for no man. A citizen is a trespasser if he wanders above normal high tide which potentially makes a mockery of the public rights on the beach for recreational purposes.[92] Other states such as Texas,[93] Oregon,[94] California[95] and New York[96] have grappled with this problem and with a variety of legal theories including dedication, prescription and custom. The Supreme Courts of those states have sanctioned public access to the intertidal zone and the right to use the dry sands of the upland for public recreation. The Courts of Texas and Oregon undoubtedly were reinforced by statutory provisions[97] granting access to the intertidal zone.

Texas has been among the first of the states to recognize the responsibility of the state to riparian land owners occasioned by the open use of beaches.[98] The problems are the same in any state, litter, liquor, traffic congestion, and mischief.[99] The State of Texas has provided for state supervision of these open beach areas either directly or indirectly through the municipalities.[100] Legislation similar to the Texas Open Beach Act was introduced in the 91st Congress by Representative Robert Eckhardt from Texas,[101] but failed passage.

An open beach act in Maine[102] it is submitted, would provide the requisite access to the Coast, disperse concentration of recreation seekers, and still retain land in private ownership. This recommendation is conditioned on a policy of strict supervision and control of open beach areas. If the state or possibly the municipality is not able to provide such protection, then some considerations should be given the riparian owner by enabling him to restrict public use of his beach area until such protection can be provided. Open beaches in Maine were the rule rather than the exception until the advent of the developer and intense recreational pressures. That there can be compatability of public access and private property is illustrated by the mixture of the masses and the millions in the promenade cliff walk encircling the "summer cottages" of Newport, Rhode Island.

FOOTNOTES

14. See discussion of nature of development, page 26, *infra.*

15. See discussion of tourism, page 15 et seq., *infra.*

16. The usual recited litany for coastal management is no irreversible damage and multiple use. These are valid criteria for coastal management but their simplicity may obscure the many facets of the problem.

17. A legislative finding in the preamble of emergency legislation is legally a determination of a public exigency (See M.R.S.A. Const. Art IV, Pt. 3, S16). As a practical matter, it is usually a boiler plate enacting clause. In regular legislation, unless enacted in the statute, it merely reflects the intent of the sponsor.

18. P. L., 1969, c. 571.

19. 38 M.R.S.A. 361 as amended by P.L., 1969, c. 571.

20. 38 M.R.S.A. 481 as enacted by P.L., 1969, c. 571.

21. P. L., 1969, c. 572.

22. 38 M.R.S.A. 541 as enacted by P.L., 1969, c. 572.

23. See *U.S.* v. *15 Acres of Land More or Less on Trundy Pond*, 78 F. Supp 956 (D.C. Me. 1948), and

23a. See: "Beauty in the Eyes of the Beholder", 71 *Mich. L. Rev.* 1295 (1973).

24. 38 M.R.S.A. 541.

25. 38 M.R.S.A. 481.

26. Public Law 92-583. See fn. 8. The placement of the administration of the Coastal Management Program, as well as NOAA, in the Department of Commerce lends additional credence to the necessity of including economic consideration in coastal management programs.

27. See an Act Relating to the Zoning Powers of the State, Hawaii Act 187, 1961. An act Creating a Coastal Resources Management Council. Act 279-1971, Rhode Island.

28. 23 M.R.S.A. 4206 (1) (G) as enacted by P. L. 1971, c. 593.

29. 23 M.R.S.A. 4206 (1) (H).

30. Maine Port Authority has purchased waterfront property in Portland formerly belonging to Canadian National Railroad, "Parley on Port Development Has Smell of Oil", (*Portland Press Herald*, October 10, 1973, p. 11.) the Maine Department of Transportation was instrumental in negotiating with the Gibbs Oil Company with regard to the recently announced plans to build an oil refinery in Sanford. (*Portland Evening Express*, October 17, 1973.)

31. See *II Maine Law Affecting Marine Resources*, 1970, p. 376.

32. L.D. 1947, Special Session 105th Legislature. See also L.D. 1756 and 1759, 106th Legislature, for proposed legislation dealing with industrial development in Maine.

33. See *Maine Sunday Telegram*, January 23, 1972, p. 11B; April 2, 1972, p. 12A.

34. See discussion page 14.

35. *Maine Clean Fuels* v. *Environmental Improvement Commission*, Me. 310 A.2d 736 (1973).

36. *Maine Clean Fuels* v. *Environmental Improvement Commission*, Law Docket No. 1342 Appellants Brief, p. 69, argued May 2, 1973. But see *In re Spring Valley Development by Lakes Sites, Inc.,* ME. 300 A.2d 736 (1973).

37. *Maine Clean Fuels* v. E.I.C., *Supra.*

38. The fact that the Legislature failed to modify the EIC's interpretation of this Act is evidence that the Legislature acquiesced in the interpretation. (*In re Spring Valley Development by Lake Sites, Inc.*, ME. 300 A.2d 736 (1973).

39. 12 M.R.S.A. 4812-A as added by P.L., 1973, c. 564.

40. 30 M.R.S.A. (3) (H) as enacted by P.L., 1971, c. 454 and repealed by P.L., 1973, c. 465.

41. 30 M.R.S.A. 4956 as repealed and re-enacted by P.L., 1971, c. 454.

42. See *Blevens* v. *City of Manchester*, 103 N.H. 284, 170 A.2d 121, 122 (1961). Cited with approval by the Maine Supreme Judicial Court in *In Re Spring Valley Development by Lake Sites, Inc.*, supra, at p. 750; *Golden v. Planning Board of Town of Ramapo*, 334 N.Y.S. 3d 138 (1972); See Bosselman, F. P., Can Ramapo Pass A Law to Bind the Rights of the Whole World? 1 Fla. 234-265 (1973).

44. See *Portland Evening Express*, Wed. October 3, 1973, p. 1. Management is also attacking the failure to include economic considerations. See "Miller Urges Site Law Repeal, B.E.P. Abolishment." *Portland Press Herald*, Oct. 24, 1973, p. 1.

45. Coastal preservation is sometimes called with acerbity "Saving the view from Mrs. Rockerfeller's picture window." See Hamilton, Andrew, Maine: "Finding the Promised Land (Without Losing the Wilderness)". *Science*, Volume 178, Nov. 10, 1972, p. 596.

46. The Arizona Department of Economic Planning and Development has a project called ATOM, Arizona Trade Off Model. (The Arizona Environmental-Economic Trade Off Model, Technology Forecasting Workshop, Industrial Management Center, June 17-22, 1973, Charles Minchall, Battelle Laboratories, Columbus, Ohio). The model is oriented toward generating trade offs. Models of this type, therefore, are useful as a tool for decision makers but cannot be used as a substitute for comprehensive planning for the highest and best use of the Maine Coast. (See also Report of Meeting of the National Association of State Development Agencies held in Portland, Maine, Wednesday, October 3, *Portland Evening Express*, Oct. 3, 1973, p. 1).

47. 12 M.R.S.A. 4807 as enacted by P.L., 1973, c. 411.

48. See State Plumbing Code; Henry, H. P., Working Paper, Proposed Shoreline Zoning Guidelines for Mandatory Shoreline Zoning and Subdivision Controls, State Planning Office, September 24, 1973.

49. 12 M.R.S.A. 4807 as enacted by P.L., 1973, c. 411.

50. See 23 Standford L. Rev. 774 (1971) for discussion of exclusionary zoning and indigents.

51. 22 Cal. Bus. & Prof. Code S11.610.5 (West Supp. 1971); Adirondack Park Land Use and Development Plan and Recommendations for Implementation, Adirondack Park Agency, March, 1973, p. 8.

52. A bill to this effect was introduced in the 1969 California Legislature but died in Committee. See Public Access to Beaches, 22 Stanford L. Rev. (1970) p. 564, 569 at fn. 24.

53. Dow, R., IV *Maine Law Affecting Marine Resources*, p. 771-774; Henty, H.P., Legal Aspects: Development of Under Utilized Marine Species, Conference Proceedings, Renewable Marine Resources Development Project, Maine Maritime Academy, Castine, Maine, May, 1972.

54. P. L., 1973, c. 513.

55. 12 M.R.S.A. 3721-3731 as enacted by P.L., 1973, c. 462.

56. Figures from the Maine Department of Commerce and Industry had estimated the revenues from tourism as approximately $600 million annually. *Maine Sunday Telegram*, Sep. 2, 1972.

57. Miller, *The Income Gap: What It Is and How It Can Be Closed,* Department of Economic Development, Fall, 1968.

58. A recent study released by the Maine Department of Commerce and Industry estimated that the figures for recreation were under $300 million. The scientific basis of earlier estimates was questioned. *Maine Sunday Telegram*, Sept. 2, 1973.

59. No ill effects were felt on the recreational industry in summer of 1973. Independent gas stations were restricted in supply but there was no general shortage. No predictions are made for next year's tourist market as estimates of shortages increase daily.

60. A recent Report by a Gubernatorial Task Force advocates making Maine's scenic resources "yield the largest long-term benefits for Mainers" rather than assuming the obligation for Maine to provide inexpensive recreation for citizens of wealthy states. It was further noted that the largest percentage of the seasonal population is composed of campers and day visitors. While these groups, which are in direct competition with Maine residents for scarce space in State Parks and on Maine's limited sandy beaches, constitute 32% of the total visitor days, they contribute only 12% of tourist expenditures. (Energy, Heavy Industry, and the Maine Coast, Report of the Governor's Task Force, September, 1972, p. 75).

61. See "Land Boom" *Time Magazine*, Oct. 1, 1973. Several examples of development in Maine are used as illustrative of the impact of tourism nation-wide.

62. A recently published opinion poll conducted by the State Planning Office indicated that 50% of the people in Maine would either discourage or take no stand to encourage tourist growth. (Maine An Appraisal by the People, State Planning Office, 1973, p. 52).

63. See "Grand Travers Bay: A Time of Choice", See Grant Program, University of Michigan, August, 1972. MICHU-SG-72-102.

64. Real estate prices in Vermont, especially for farm land, have skyrocketed as the result of out-of-state pressure. The Vermont Legislature has recently enacted tax laws to discourage speculation in land. (Act No. 250 of the Acts of 1970)

65. "Oregon Hopes Visitors Will Stay Away." Many of the residents of the State, however, are "up in arms" over the influx of visitors, fearing ruination of the environment and also difficulty getting their own campsite when they want it. It is because of the furor that Governor McCall was pressured into telling the world tourists are not welcome, and a ban on advertising for tourists was placed on the travel division. *Portland Press Herald*, June 20, 1973.

67. Restrictive laws governing birth control and abortions have been consistently found to be unconstitutional, but these decisions relate only to voluntary use of these alternatives. Decisions as to constitutionality have not automatically resolved questions of morality. See for example: John T. Noonan, *The Morality of Abortion*, Harvard University Press, 1970. This and other books about abortion were reviewed in 5 Suffolk L. Rev. 1114 (1971).

68. See "Solon Proposes Higher Fees for Outside Campers" *Portland Evening Express,* October 24, 1973, p. 40.

69. The New Jersey Supreme Court ruled against a borough ordinance requiring non residents to pay a higher admission fee to the local beach than residents (*Borough of Neptune City* v. *Borough of Avon by the Sea*, 61 N.J. 296, A2d 47 (1972); A New York state court has struck down a restrictive beach ordinance in Long Beach on Long Island - *Gerwitz* v. *City of Long Beach,* 69 Misc. 2d 763, 330 N.Y.S. 2d 495 (Sp. ct. 1972) A law suit to open town beaches to outsiders will be filed against the towns of Fairfield, Milford, and Westport, Connecticut challenging the policy of excluding non residents from town beaches or charging disproportionately higher entrance or parking area fees ("Bathing Suit" is Planned in Bid to Open Beaches" *Portland Evening Express*, Sept. 5, 1973).

70. U. S. Constitution Art. IV, Sec. II; argument is also made under the equal protection clause of the U. S. Constitution (14th amendment).

71. *State* v. *Leavitt* 105 Me. 76, 72 A. 875 (1909).

72. Id. p. 85; to the same effect *State* v. *Peabody*, 103 Me. 327, 69 A. 273 (1907).

73. P. & S. L., 1967, c. 157.

74. Id.

75. Resolve P. & S. L. 1973, c. 138.

76. "Biddeford Pool Beach Owners Counter Attack in Court", *Portland Press Herald*, Oct. 5, 1963, p. 9.

77. "State Eyes Southern Maine Beach for Public Park Land" *Portland Press Herald* Oct. 5, 1973 p. 1; "Belligerent Biddeford" *Portland Press Herald* Oct. 6, 1973, p. 6.

78. "Our Nation and the Sea", Commission on Marine Science, Engineering and Resources, GPO, 1969, Panel Report Vol 1 Science and Environment, P. III-17-18, p. 111-155. See also III *Maine Law Affecting Marine Resources*, p. 501 et seq.

79. See Draft, "Coastal Overview; Conservation Priorities Plan of the Coast of Maine", Reed & D'Andrea under the auspices of the Smithsonian Institution's Center for Natural Areas. Appendix C, Sept. 1973, for inventory of ownership of coastal lands.

80. Id. P. IV-1. Contained therein is a discussion of the Coastal Foundation, a private non-profit corporation formed to organize and conserve coastal land in Maine. The Land Guard Trust, another privately financed group, has recently purchased Stone Island, key real estate to any oil development in Machiasport (*Portland Press Herald*, October 24, 1973, p. 10).

81. California Department of Parks and Recreation, California Policy for Recreation II (1970) p. 812. The California coastal initiative (see footnote 3) undoubtedly signifies a recent shift in this policy as the state's voters have authorized a stringent public management scheme for its coast.

82. See 23 Stanford L. Rev. 811 (1971).

83. 1814 Edition of Ancient Charters and Laws of the Colony and Province of Massachusetts Bay, p. 148 (Reprinted in II *Maine Law Affecting Marine Resources*, p. 189.

84. See *Shivley* v. *Bowlby* 152 U.S. 1 (1893).

85. The intertidal zone is reserved for the public under the public trust doctrine. Riparian prerogatives and preferences usually relate to access and priority for leasing areas for aquaculture. See Henry, H.P., "A General Legal Perspective": Aquaculture: A New England Perspective, New England Regional Information Program, 1971, p. 51.: Public Access to Beaches: Common Law Doctrines and Constitutional Challenges, 48 N.Y.U. L. Rev. 369 (1973); Public Access to Beaches, 22 Stanford L. Rev. 564 (1970); Public Rights in Open Beaches: A Theory of Prescription. 24 Syra. L. Rev. 935 (1973).

86. "Provided that such proprietor shall not by his liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands". See footnote 83.

87. *Butler* v. *Attorney General* 195 Mass. 79 (1907).

88. *Blundell* v. *Catterall*, 5 B&A 268; 3 Kent 417.

89. *Andrew* v. *King*, 124 Me. 361, 364; 129 A. 298 (1925).

90. *Littlefield* v. *Hubbard*, 124 Me. 299, 128 A. 285 (1925); *Small* v. *Wallace*, 124 Me. 365, 129A. 444 (1925).

91. "And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's property for that end, so they trespass not upon any man's corn or meadow." See Footnote 83.

92. The problem of gaining access to the intertidal zone and the necessity of crossing private beach to gain access has facetiously been termed the "Volkswagen principal" by

Representative Robert Eckardt of Texas, an advocate of open beaches, since the only way to utilize the beaches here without the upland is to get into a tiny vehicle and drive very quickly before the tide comes in. (See *New York Times*, July 30, 1972. p. E-6). See also *Tucci* v. *Salzhauer*, 336 NYS2d 721; 40 A.D. 2d 712 (1972); A contrary ruling may be found in *Trustees of the Internal Improvement Trust* v. *Maderia Beach Nominee* 272 So 2d 209 (1973) which held that the public had no right to cross private property to reach navigable water.

93. *Seaway* v. *Attorney General*, 376 S.W. 923 (Tex. Civ. App. 1964).

94. *State ex* rel. *Thornton* v. *Hay*, 254 Ore 584, 462 P2d 671 (1969).

95. *Dietz* v. *King* 2 Cal. 3d 39, *Glon* v. *City of Santa Cruz*, 2 Cal 3d. 29, 465 P.2d 50 (1970).

96. The New York Court in *Gerwitz* v. *City of Long Beach* Supra (FN 69) held that a beach once opened to the general public constitutes an irrevocable dedication and hence a public trust.

97. Act 19-1959 (The Open Beaches Bill), Vernon's Annotated Texas Statutes, Article 5415d; Oregon Statutes Section, 390. 605 390.610.

98. Vernon's Annotated Texas Civil Statutes, Article 5415d.

99. See *Footprints on the Sands of Time*, Report of the Interim Beach Study Committee, 61st Texas Legislature, 1970.

100. Vernons Annotated Texas Statutes, Article 5415d-1.

101. The Federal Open Beaches Bill contained the following language.

    Section 102. Congress declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral land owners as may be protected absolutely by the Constitution. It is the declared intention of Congress to exercise the full reach of its Constitutional power over the subject.

    (See H. R. Rep. No. 4951, 92nd Cong. 1st Session 1971). A similar measure (S 2621) was introduced by Senator Jackson on Oct. 30 of this year. See Congressional record S 19605 Oct. 30, 1973.

102. Success of passage or implementation of an open beach act in Maine undoubtedly would be predicated on an inventory of likely points of access which could be designated as such, and if necessary, acquired by the state. Such access could legitimately be incorporated as critical areas or areas of Overriding State Concern (See discussion pages 39, 57). The State of Rhode Island has conducted a study of access opportunities. (See Public Rights of Way to the Shore, State of Rhode Island, March 1970).

III SAVE THE MAINE COAST — HOW?

Noble words will not suffice to assure the accomplishment of noble deeds. The determination to save the Maine Coast must be accompanied by an appropriate legal foundation and an operable administrative structure that will transform the rhetoric into reality. In examining the adequacy of Maine's present legal framework and making recommendations to modify this framework for more effective coastal management it is necessary to assume, without deciding, certain common goals and objectives. The ensuing analysis is predicated on the following assumptions:

1. The State has an overriding interest in the marine environment.
2. The highest and best use of the Maine Coast is for recreation and the harvesting of marine resources. Citizens of Maine should have visual access to scenic portions of the coast and actual access to large portions of the shore.
3. There are certain areas of the coast that must be subject to rigid constraints to prevent any or only very controlled development. These areas include ecologically fragile land and water areas; areas of unique biological, geological, or historic interest; and areas that are extremely biologically productive.
4. Some portions of the coast must be utilized for industrial development which may include heavy industry, installations for the production of energy and major port facilities.
5. The use of the remainder of the coast must be allocated in conformance with local option provided that such option must yield when necessary to the paramount interest of the State in the marine environment.
6. The general legal framework that is adopted to manage coastal land and water areas must be equally applicable or easily adaptable to the shores of inland waters. Such framework must be compatible, if not identical, with the legal structure used to regulate land areas that do not border water bodies.
7. Any regulatory scheme must be based on the capacity of the land and water areas to withstand the impact of development and use.
8. Local involvement in formulating the Maine Coastal plan and in administering coastal management laws should be encouraged. Financial and technical assistance must be provided to municipalities of limited resources in obtaining and utilizing environmental data.
9. The average citizen must be subjected to a minimum of red tape in the administration of laws designed to protect the environment.

Down to the Sea in Triplicate

Environmental legislation, in a position similar to that of President Warren Harding, has nothing to fear from its enemies, only its friends. Maine is not alone in the proliferation of environmental legislation and labyrinth of permits and procedures that have been enacted in the name of conservation.[102]a If adequacy is to be measured just by sheer number of statutes, Maine law is more than adequate. Unfortunately, the legislative approach has been piece-meal and the effect of each new law on other laws or the total legal structure has not been carefully evaluated. While the aims and objectives of most of this legislation is similar or compatible there is much duplication, delay, potential conflict, and unnecessary and burdensome red tape. Federal law in the environmental field has paralleled the growth of state and municipal ordinances. To these environmentally oriented

statutes must be added a vast number of other laws that, while not environmentally motivated or even specifically designed for the coast, have a tremendous impact on activity along the coast.

The long and sometimes tortuous journey through three levels of governmental processing and subsequent judicial review of constitutional and other implications is a very effective de facto land use control.[103] To participate in this journey it is necessary to have lead capital, financial ability to retain necessary technical and scientific assistance, and the ability to wait for an uncertain outcome, much less initial approval. This situation works to exclude the small contractor or developer with limited resources who has been the strength of Maine and who has helped develop the characteristics of the Maine coast in a manner that is sought to be preserved.

The comparison of the simplicity of instructions contained in the Ten Commandments to the bulky application permit deplored by a real estate developer in Rhode Island[104] has its counterpart in Maine in which the Maine Clean Fuels Application could be better measured than evaluated while the Pittston Fuel Application would be more meaningfully weighed. Requiring information of this magnitude is perhaps not unreasonable for a major development, but the procedure and forms necessary for small developments, even when the final outcome can be predicted with ease, does need some streamlining.

The result has led a leading environmental lawyer, Professor Joseph H. Sax of the University of Michigan Law School, to observe that Maine was well on the road to developing an intricate overlapping bureaucratic scheme of environmental legislation with the concomitant bureaucracy that will ultimately collapse under its own weight.[105]

What is needed in Maine law is the mechanism to "put it all together"—facilitate compliance, weed out duplication, and avoid a tendency to tedious bureaucracy. Perhaps the synthesis that will be possible through the proposed critical areas legislation and the Federal Coastal Zone Management Act[106] can serve as the appropriate vehicle.

Judicial Climate

An appraisal of the judicial climate is useful before evaluating any environmental laws. Nationwide, the climate, it is submitted, has progressed from actual hostility, through benign neglect, to favorable disposition. The decision in *Zabel* v. *Tabb*[107] in which ecological implications were held legitimate considerations by the U.S. Corps of Engineers in denying a dredging permit, is a bench mark decision. Of perhaps equal or even greater importance, because of its implications for the validity of State's Regulatory powers in the environmental field in which Congress has acted,[108] is the decision of the U.S. Supreme Court in *Askew* v. *American Waterways Operators, Inc.*[109] which upheld the validity of a Florida statute closely modeled after the Maine Coastal Conveyance of Petroleum Act.[110] The Maine Court subsequently ruled favorably on the constitutionality of the Maine Act[111] as it had ruled previously on the Wetlands Control Act[112] and the Site Location Act.[113] The decisions of the Maine Supreme Judicial Court that have "jolted" the environmentalists such as *Stanton* v. *Trustees of St. Joseph College*[114]

have been hopefully ameliorated by statute[115] or, as in *State* v. *Johnson*,[116] are susceptible to an opposite result on a basis of a different fact situation, a different theory of law, or a different attitude by the Court.[117]

In Maine, as in the nation, there is an established tendency to uphold the constitutionality of most environmental laws; the courts concentrate their scrutiny to determine if the law has been constitutionally applied or whether there has been an unconstitutional taking.[118] Thus, the greatest legal barrier to be faced by coastal managers is not whether the particular restriction is constitutional, but whether, in its application, it has crossed the fine and not easily determined demarcation between legitimate exercise of the police power and a taking for which the property owner must be compensated.

FOOTNOTES

102a. See Unofficial Composite. General Permitting Procedures for Coastal Activities in Florida, Florida Coastal Coordinating Council, June, 1971.

103. While not usually regarded as part of the legal framework for restraint and control on development or shoreline management the process most certainly has that effect. Consider the landowner in the now famous *Commission of Natural Resources* v. *Volpe* 349 Mass. 104, 206 N.E. 2d 666 (1965) case which involved the filling of coastal wetlands. The original denial of permission to fill was decided on October 9, 1963 by the municipality. The action was first judicially heard in a January, 1964 motion to enjoin when the owner proceeded to fill the land. In its 1965 decision, the Massachusetts Supreme Judicial Court remanded the case to the trial court to be reheard in accordance with its instructions. By the time that it had again found its way for a last and final time to the Superior Court of Massachusetts, it was adjudicated that it was a taking and that the land could be filled (1972). The Commissioner of Natural Resources declined to pursue the matter further, presumably because of the nature of the record in the lower courts. Whatever the merits of the final outcome the landowners' property was tied up for almost a decade. (See: "Open Space and Recreation Program for Metropolitan Boston", Volume 4 Massachusetts Open Space Law, April, 1969).

Appeals under the Site Location Law go directly to the Supreme Judicial Court of Maine (38 M.R.S.A. 487) which eliminates some of the lead time but does not always assure a speedy resolution of development plans.

104. An observation made at 3rd New England Coastal Management Conference, Durham, New Hampshire, October 30, 1972 with regard to real estate development on a barrier beach in Rhode Island.

105. Gist of remarks made by Professor Sax at a conference on Maine Environment and the Law, sponsored by the Maine Bar Association and the Natural Resources Council of Maine, Kennebunkport, Maine January 12, 1973, which were summarized before the Committee on Natural Resources of the 106th Legislature, May 17, 1973, in hearings on L.D. 542. An Act Creating a Study Commission on Environmental Laws. The Act, (L.D. 542) as amended (L.D. 1977) initially passed both houses of the Maine Legislature but died on the appropriations table.

106. See Footnote 8. In this connection it should be noted that a federal land bill has passed the Senate (S 268) which should be anticipated in designing land use legislation for Maine.

107. 430 F2d 199. (5th Cir. 1971).

108. Water Quality Act of 1970, Sec. 11 Control of Pollution by Oil, Public Law 91-224, 84 Stat. 91 (1970).

109. 36 L. Ed. 280, 93 S.Ct. – (1973).

110. See 38 M.R.S.A. 541-557.

111. *Portland Pipe Line* v. *Environmental Improvement Commission*, ME. 307 A.2d 1 (1973), *Cert. denied, Atlantic Section* #307 L. Ed. *Nov. 19*, (1973).

112. *State* v. *Johnson*, Me. 265 A2d 711 (1970).

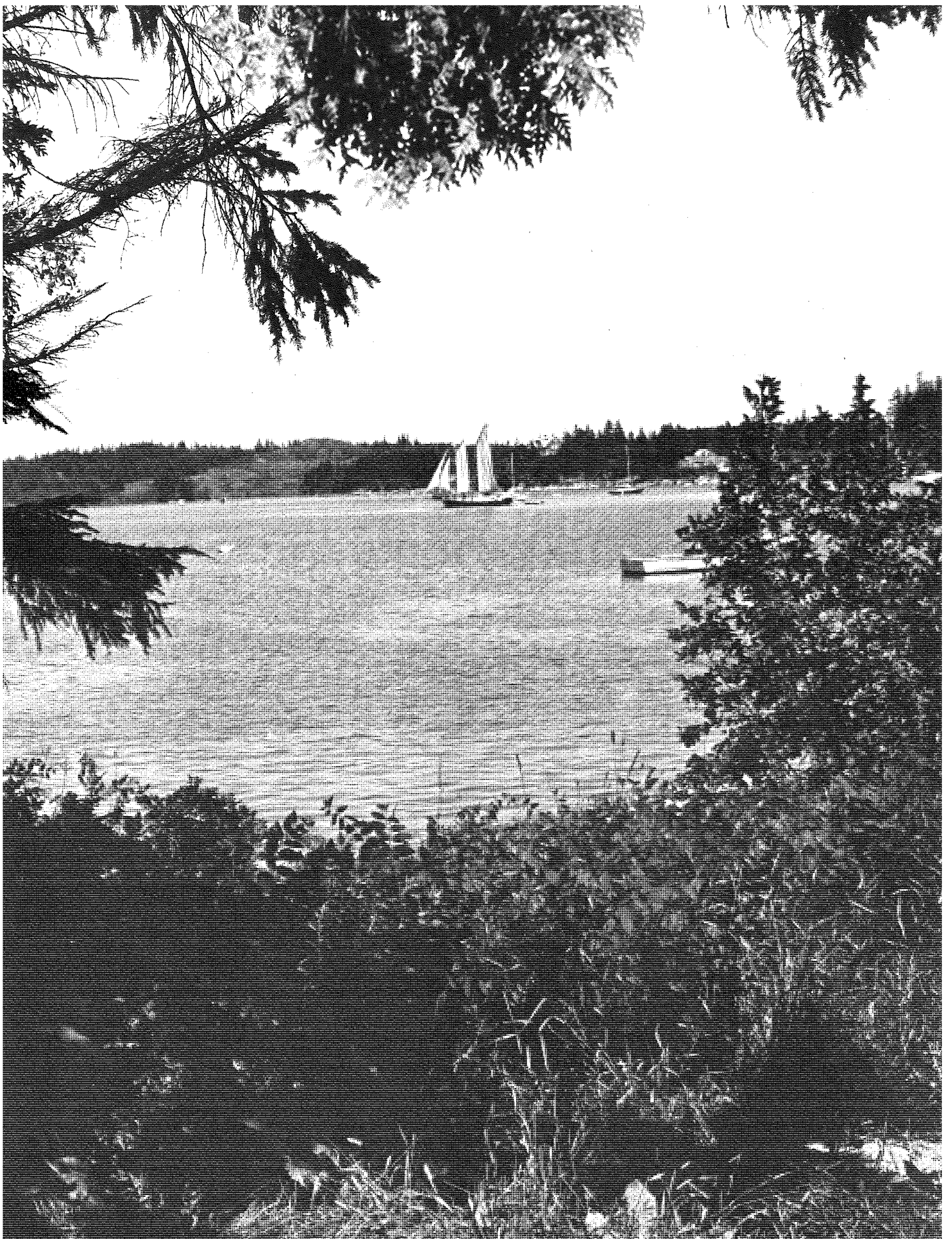
113. In Re *Spring Valley Development by Lakesites, Inc.* ME 300 A2d 736 (1973).

114. Me. 233 A2d 718 (1967); Me. 254 A2d 597 (1969).

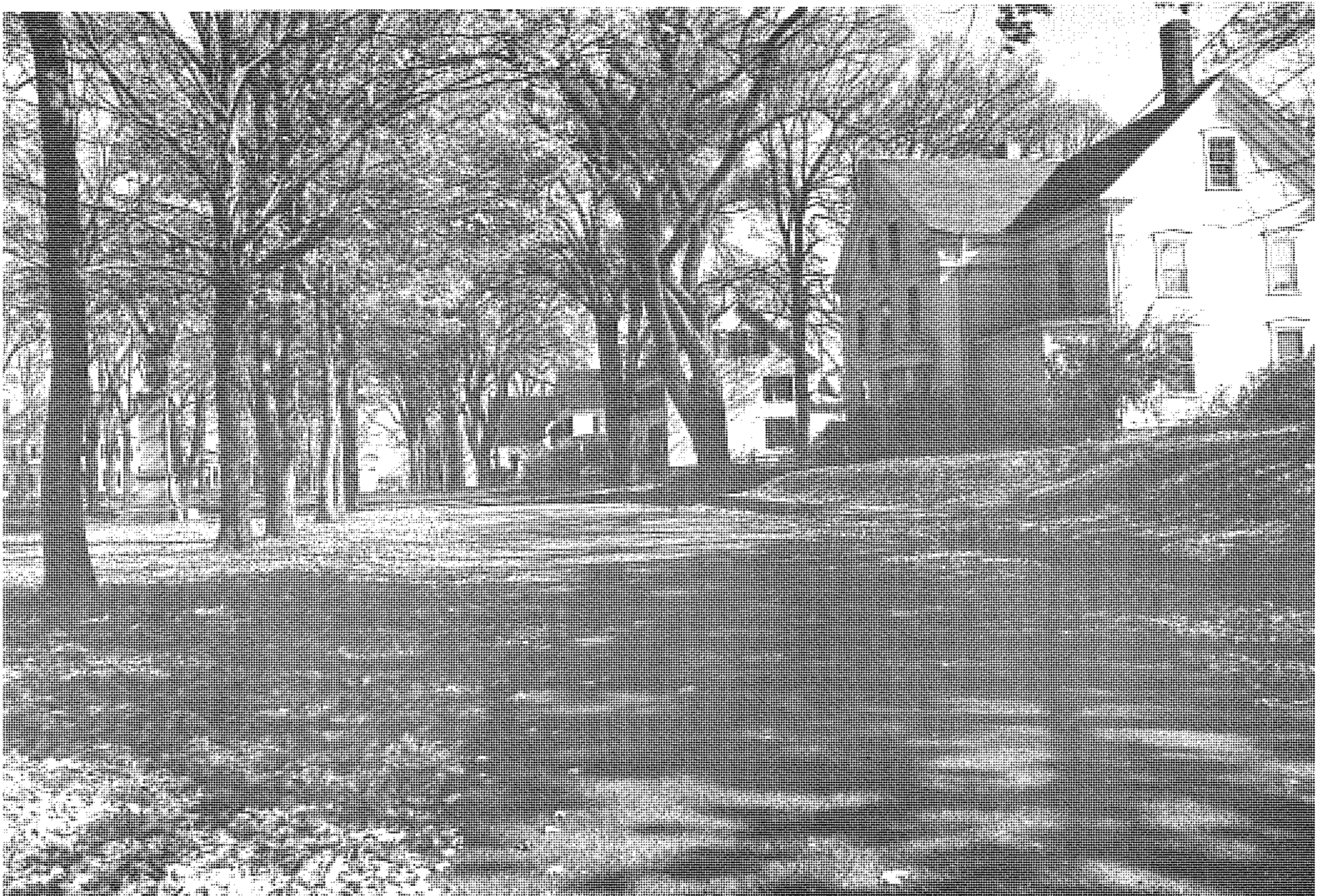
115. In the *St. Joseph's* case the College was prohibited from discharging into a brook because the College was not a riparian owner and the discharge would have increased the volume of the brook but not altered the quality. Although there were no actual damages, the riparian owner was afforded relief on the "natural flow" theory of water law. 38 M.R.S.A. 415 was amended by the addition of a paragraph that denies a riparian owner a cause of action unless the discharge lowers the classification of the water body or causes actual damage. By the amendment it becomes immaterial that the source of the discharge is not a riparian owner. (P.L., 1971, c. 461 Sec. 5). See also Henry, H. P. "Water Rights on the River" *Penobscot River Study*, Vol. 1, Technical Report No. 1, University of Maine at Orono, Environmental Studies Center, p. 58.

116. In the *Johnson* case the Department of Sea and Shore Fisheries representative had testified that there was no other economic use of the land. (See Me. 265 A2d 711 (1970); 23 Maine L. Rev. 118 (1971). The relevancy of the Colonial Ordinances, a question raised in *Commissioner of Natural Resources* v. *Volpe* 349 Mass. 104, 206 N.E. 2d 666 (1965) but not discussed, was not considered in the *Johnson* case. A petition for rehearing, based in part on the relevancy of the Colonial ordinances, at least as far as the intertidal zone was concerned, (Motion for Rehearing, Review and Clarification by Wet Lands Control Board and State of Maine, *Johnson* v. *Wetlands Control Board*. Law Court Docket #1487 decided May 21, 1970. Petitioner's Brief 11 December Term Supreme Judicial Court, [1970]) was denied without hearing.

117. See In Re *Spring Valley Development by Lakesites, Inc.* Supra. p 750. In this case the Maine Supreme Judicial Court with reference to a proposed subdivision, speaks at length about the incapacity of the environment to withstand the impact of development. "The duty is no doubt more burdensome as the land is less suitable and it may be impossible of compliance [with Site Selection Law] if the environment is of a type incapable of sustaining the proposed [subdivision] development. In the latter situation the public welfare demands that the land be used for another purpose or that the impact of the same use be diminished."



IV WHAT MAINE LAW IS APPLICABLE TO COASTAL MANAGEMENT?



Maine Law — A Broad Overview

Maine law relating to the management of the coast falls into three broad categories: (1) Thou shalt not, (2) thou shalt not unless you have the requisite permits, and (3) thou shall proceed according to a comprehensive plan, established directives, and environmental guidelines that will assure the highest and best use of the Maine coast.

The first generation of environmental laws usually fell in the first or second categories; such laws usually related to a specific resource, activity, or area. There have been many recent laws in these two categories. In addition, many of the laws that have long been in the statutes have been more fully utilized as a result of recent amendments or because they have been more rigidly and extensively enforced.[119] Furthermore, in the last six years there has been a tremendous increase in the number of broad environmental laws that relate to land and water uses (e.g. the Wetlands Control Law,[120] the Site Selection Law,[121] the minimum lot size and frontage laws[122]) as the Legislature realized the urgent public necessity of controlling development, particularly along the coast, if Maine were to be saved from unwise development.

It was not until 1971, however, that the Legislature, in the passage of the Wetlands Protection Act,[123] the Mandatory Shoreline Zoning and Subdivision Control Law,[124] and the Municipal Subdivision Law,[125] authorized planning for the optimum use of the coast in accordance with sound environmental criteria, rather than allowing municipalities or the State merely to react to every new environmental threat or crisis. This limited acceptance of statewide zoning, it is submitted, finally became politically feasible because citizens with an anathema to "any one telling me what I'm going to do with my own land" finally realized that by default they were being deprived of this decision by outside pressures and economic forces beyond their ability to resist.

While all laws relating to coastal management must be considered in evaluating the legal framework, five statutes are particularly important to municipal involvement in coastal management. These will be discussed below. Other Maine law, much of which is extremely important, is catalogued in the accompanying Appendix.

Wetlands Control Act

The Wetlands Control Act of 1967[126] requires that a permit must be obtained to remove, fill, dredge or otherwise alter any coastal wetland or drain or deposit sanitary sewage into or on any coastal wetland.[127] Permits must first be acted on by municipal officials and if approved locally must also be approved by the Department of Environmental Protection. Approval may be withheld by either the municipality or the state if the proposed action:

Threatens the public safety, health or welfare.

Adversely affect the value or enjoyment of the property of abutting owners.

Damages the conservation of public or private water supplies.

Damages the conservation of wildlife, fresh water, estuarine or marine fisheries.

In *State* v. *Johnson*[128] a denial of a permit to fill was held to be an unconstitutional taking. The Court reasoned that, inasmuch as the benefit of preserving coastal wet-

lands would be felt statewide, that the cost of its preservation should be publicly borne. While there is no doubt that there will be instances either under the Wetlands Acts or other legislation in which restrictions will be adjudicated a taking for which the owner must be compensated, the language in the *Johnson* case, if literally and rigidly applied, constitutes a potential obstacle to effective coastal management. Presumably the *Johnson* case will be ignored, if not overruled, if the Court is to uphold environmental zoning or regulations predicated on the tolerance and capability of land and water areas as envisaged in the Shoreline Zoning Act. The tenor of the Court in the *Spring Valley* v. *Lakes Sites*[129] case would indicate however, that such a course of action will not be difficult.

The Court, in a similar type of appeal could distinguish the *Johnson* case on at least three different grounds. *First*, on a different fact situation. In the *Johnson* case there was an incredibly bad record. There was uncontroverted, but perhaps not accurate, testimony by an agent of the Department of Sea and Shore Fisheries that the land was of no commercial value without filling.[130] *Second*, the Court could have considered for what purpose the land was to be filled and evaluated the resultant environmental effect on the marine waters. The Court did leave itself an escape clause in dicta by pointing out that while the prohibition on filling was not constitutional, "it would not necessarily follow that restrictions as to draining sanitary sewage into a coastal wetland would suffer the same infirmity."[131] The Wetlands Control Act did not then, nor does it now, require the applicant to make final plans at the time of application nor be bound by any plans that he sets forth in his application. Federal permission for filling or dredging under permits issued by the Corps of Engineers, however, now require the applicant to state his plans and approval is conditioned on abiding by these plans.[132] Since the Johnson decision, the Department of Environmental Improvement has been given power to impose conditions under the Wet Land Protection Act,[133] a power it did not have under the Wetlands Control Act.In the *Johnson* case the Court was aware "that the land had no commercial value without fill"[134] and that "it was being filled to make it adaptable for development,"[135] but the Court anticipated rather than found that a sewage disposal system would be necessary for subsequent development

The logical inference from this dicta is that discharge of sanitary sewage into coastal wetlands could be constitutionally prohibited because it would pollute marine waters. The inference is the ultimate paradox. Why should it be a constitutional exercise of the police power to prevent an action which merely contaminates fish and shellfish, but be considered an unconstitutional exercise of the same power to prohibit, without compensation, an action which destroys the fish, their habitat, and the source of nutrients for both inshore and deep sea fisheries. The Court, no doubt, was heavily influenced by the *Volpe*[136] case and litigation with respect to restrictions on flood plains. In flood plain cases, if the restriction is to prevent damage it is usually upheld as a lawful exercise of the police power.[137] On the other hand if the restriction is not designed to protect against some particular harm but results in making the land usable or valuable only for public benefit it is usually considered a taking.[138] The wetlands and the flood plain cases, however, are not completely analagous because alteration of coastal wetlands constitute irreversible damage whereas alteration of flood plains might not be so devastating.

Third, a reference to the Colonial Ordinances, would have provided sufficient legal basis to restrict filling at least as far as the intertidal zone was concerned.[139]

Wetlands Protection Act

After the decision in the *Johnson* case, the Legislature passed the Wetlands Protection Act[140] which enables the state to place restrictions on coastal wetlands. After notice and appropriate time for appeal, such restrictions constitute a permanent easement on the title to such land. If any land owner challenges the restriction within the allotted time, and it is adjudicated that such restriction amounts to an unconstitutional taking, the State then has the option of acquiring the property or removing the restrictions on that specific parcel of property. The mechanism is similar, but more limited in scope, than restrictions on land possible under conservation easements.[141] The Wetlands Protection Act, to date, has not been extensively used.

The Site Location of Development Law

The Site Location of Development Act was enacted in 1970[142] in response to the specific threat of an aluminum smelting plant and unregulated oil development on the Maine Coast.[143]

A permit is required from the Department of Environmental Improvement for the location of developments that substantially affect the environment to assure that they are sited to have the minimal adverse effect on the natural environment.[144] Covered under the Act is:

> . . . any state, municipal, quasimunicipal, educational, charitable, commercial, or industrial development, including subdivisions but excluding state highways and state aided highways, which require a license from the Board of Environmental Protection, or which occupies a land or water area in excess of 20 acres, or which contemplates drilling for or excavating natural resources on land or under water, excluding borrow pits for and fill or gravel regulated by the State Highway Commission and pits of less than 5 acres, or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.[145]
>
> Approval of an application for a permit is conditioned on:[146]
>
> 1. *Financial Capacity.* The developer has the financial capacity and technical ability to meet state air and water pollution control standards, and has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies.
>
> 2. *Traffic Movement.* The developer has made adequate provision for traffic movement of all types out of or into the development area.
>
> 3. *No Adverse Effect on the Natural Environment.* The developer has made adequate provisions for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character, or natural resources in the municipality or in adjoining neighboring municipalities.

4. *Soil Type.* The proposed development will be built on soil types which are suitable for the nature of the development.

The Site Selection Law is operative both in municipalities and in unorganized territories administered by the Maine Land Use Regulation Commission (LURC).[147] Specific statutory provision is made for LURC to waive hearings on a development if the Department of Environmental Protection approval has already been obtained; similarly LURC approval is to constitute prima facie evidence that the proposed development meets the requirements of the Site Location Law.[148] No similar provision is made for the relationship between the Site Location Law and the Maine Shoreline Zoning Law or the Municipal Subdivision Law.

The Department of Environmental Protection which is responsible for administration of the Site Location Law is also responsible for the administration of the minimum lot size and minimum frontage requirements for areas using subsurface waste disposal systems.[149]

The Site Selection Law, which was conceived in crisis has aged with amazing agility. It has successfully withstood several major challenges. It has been amended, but the amendments have primarily served to tidy up some sections rather than materially change the law. A regrettable substantive change, however, was the exclusion of the construction of state or state aided highways from the effect of the law.[150] It is a bad precedent. Today the highways, tomorrow the utilities, public power authorities, and port developments. The trend is evident in exclusion of the state and public service corporations from municipal zoning[151] ordinances. The sovereign should set the example.

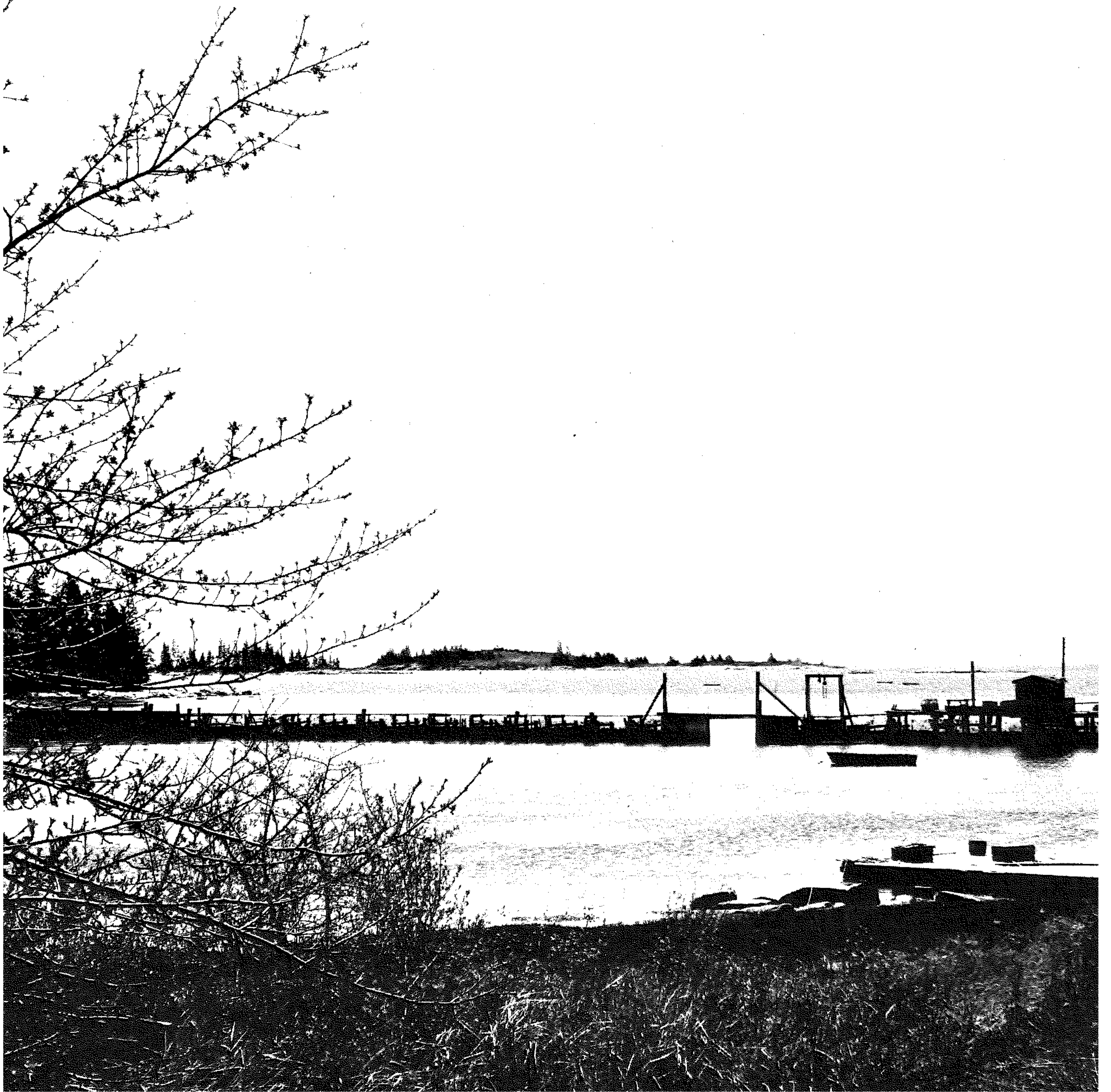
The Supreme Judicial Court first examined the Site Location Law in *King Resources* v. *EIC*[152] and said, in what now must only be considered as dicta, that the law "was in the nature of zoning."[153] It was a natural "mistake" to make. During legislative deliberations, some members of the Legislature had described it as state level zoning.[154] Even the State, itself has argued to the Law Court that the Wetlands Control Act which is similar but narrower in scope than the Site Selection Law, was a form of zoning.[155] The gulf between the Site Location Law and zoning was further broadened *In re Spring Valley Development.*[156]

> "While the Site Selection Law bears a resemblance to zoning ordinances in that both seek to restrict the use of land to areas appropriate for the purpose, the basic purpose of the two laws are distinguishable."[157]

The Court then cited *Wright* v. *Michaud*[158] to clarify what zoning is and went on to rule that the Site Selection Law did not fit that definition.

> The Site Location Law on the other hand is not directed toward promoting an orderly community growth relating one area of a community to all other areas. It is not concerned with where a development takes place in general but only that the development takes place in a manner consistent with the needs of the public for a healthy environment.[159]

It is hard, it is conceded, to dispute the Court's position that it is not exactly like municipal zoning, especially municipal zoning in the traditional Euclidian sense. Perhaps the Maine Court was anxious to throw off the straightjacket in which traditional zoning would have bound it. The court could have simply distinguished state level zoning from municipal zoning. The concern for the environ-



ment, ecology, and deference to land and water capabilities and the need for governmental regulation[160] so eloquently articulated in the *Spring Valley* case, will assure continued reliance on this case both within Maine and elsewhere for a long time. But it is possible that the Court missed the opportunity to be the author of a precedent setting definition of non-euclidian environmental zoning.[161]

What the Court says the Site Location Law is not, in addition to what the Court says the Site Location Law is, is necessary for effective coastal management. Cries that traditional zoning have not been effective in saving the environment may be very true, but it is also equally true that traditional zoning has not been very effective in establishing an "orderly development of the community."[162] The best of what the Site Location Law is, and is not, must be synthesized. Relating more specifically to Maine, the Site Location Law, traditional zoning, the municipal subdivision enabling legislation, and the Mandatory Shoreline Zoning and Subdivision Law must be coordinated. The concept of critical areas as areas of overriding state concern may be the mechanism to accomplish the fusion, and enable the State, in conjunction with municipalities, to save the coast, the environment, guide development, and provide access to recreational areas.

Municipal Regulation of Subdivisions

A 1971 revision of the Municipal Regulation of Subdivisions Law[163] recast this statute to reflect land and water capabilities and other environmental considerations[164] including the provision that any subdivision which is situated "within 250 feet of any pond, lake, river or tidal water, will not adversely affect the quality of such body of water or unreasonably affect the shoreline of such body of water."[165] The teeth in this law are provided through the requirement that no public utility, water district, sanitary district, or any utility company of any kind may serve a subdivision for which a plan has not been approved by the appropriate municipal body after review by that body in light of the municipal subdivision ordinances. Neither may land be conveyed or sold in a subdivision or the plan recorded in the appropriate Registry of Deeds unless such subdivision has municipal approval.[166] While there is a specific penalty for violation of these restrictions,[167] unless the subdivision also falls under the Site Selection Law or the Mandatory Shoreline Zoning Law there is no State review of the proper incorporation of environmental criteria in municipal subdivision ordinances or in municipal review of proposed subdivisions.

The greatest opposition to this environmental subdivision law has not been based upon the necessity of complying with environmental considerations but in the definition of subdivisions. The original definition:

> A subdivision shall be the division of a tract or parcel of land into 3 or more lots for the purpose of sale, development or building.[168]

was inconsistent with the definition of a subdivision under the Maine Land Use Regulation Commission[169] and the Site Location Law.[170] The definition was amended by the 106th Legislature[171] to read:

> A subdivision is the division of a tract of land or parcel of land into 3 or more lots within any 5-year period, whether accomplished by sale, lease, development, building or otherwise except when the division is

accomplished by inheritance, order of the court or gift to a relative, unless the intent of such gift is to avoid the objectives of this section.

In determining whether a parcel of land is divided into 3 or more lots, land retained by the subdivider for his own use as a single family residence for a period of at least 5 years shall not be included.

No sale or lease of any lot or parcel shall be considered as being a part of a subdivision if such a lot or parcel is 40 acres or more in size, except where the intent of such sale or lease is to avoid the objectives of the statute.

This section was probably designed to monitor residential subdivisions, but the definition is broad enough to make almost any sort of development a subdivision.

What is not clear from the statute is the relationship of this law to the Maine Mandatory Shoreline Zoning and Subdivision Control Law (the Maine Shoreline Zoning Law) and the Site Selection Law.

Mandatory Shoreline Zoning and Subdivision Control Law.[172]

The stated purpose of the Shoreline Zoning Act is to aid the state in its role as trustee of its navigable waters by requiring municipalities to enact zoning and subdivision controls for land within 250 feet of a water body. The controls are to[173]

1. Further maintenance of safe and healthful conditions;
2. Prevent and control water pollution;
3. Protect spawning grounds, fish, aquatic life, bird and other wildlife habitat;
4. Control building sites, placement of structures and land uses;
5. Conserve shore cover, visual as well as actual points of access to inland and coastal waters and natural beauty.

Municipalities are to prepare a comprehensive plan in accordance with Title 30, Section 4961, and adopt shoreline protection, subdivision and zoning ordinances by July 1974.[174] The Department of Environmental Protection and the Maine Land Use Regulation Commission, under the administrative direction of the State Planning Office, are to adopt minimum guidelines for the preservation of shoreline areas.[175] If a municipality fails to meet this deadline or if its ordinances are considered too lax, the Department of Environmental Protection and the Maine Land Use Regulation Commission, following consultation with the State Planning Office, must adopt ordinances for such communities.[176] If the municipalities fail to administer and enforce ordinances adopted by municipal action or imposed by the State, the Attorney General must bring an action in Superior Court to compel such enforcement.[177]

There are certain inadequacies in the Maine Shoreline Zoning Act, internally, and in relation to other Maine law.

The original Act, passed much to the surprise of its proponents as well as its detractors, was enacted without funding or a realistic deadline for Maine communities.[178] From its legislative history, it can be surmised that the Act was intended to require coastal communities to institute zoning. The 1973 amendment,[179] extending the deadline, narrowed the focus of the law to environmental[180] considerations and land and water capabilities if only 250 feet were zoned but at the same time tied the mechanics even more closely to traditional zoning. The result

has been to foist on presently unzoned communities a very technical and scientific concept of land use controls without adequate financial or technical assistance or the requisite educational preparation.[181] Furthermore, it does not encourage total community zoning or anticipate the Federal Coastal Zone Management Act and other anticipated federal land use laws.

The objective of the Act, it is submitted, is to require positive comprehensive planning by municipalities and the enactment of ordinances that will reflect (1) municipal adopted objectives and (2) protection of the environmental integrity of the shore. Whether the municipality zones the entire area under its jurisdiction or merely the 250 feet required by this law, it should be based on local decision as to how the shore can best be utilized. Local decision should only be restricted or overruled if it encroaches on areas of overriding state concern or it violates the capacity of land and water areas to tolerate the recommended activity. The success of the Act rests upon local cooperation and vigorous enforcement by municipal supervision. The totality of a municipality's concerns, and not just environmental considerations, must be reflected in its shoreline ordinances if this type of cooperation is to be reasonably anticipated. If the guidelines for the implementation and administration of this Act do not proceed on this philosophy, each decision about a specific activity must be reviewed on an ad hoc basis and a gigantic bureaucracy must be created at the State level to assure effectiveness of this Act.

Integration of Traditional Zoning and Land and Water Capabilities

Effective environmental zoning is a "which comes first, the chicken or the egg" situation. Resource information such as soil types, water tables, geological structure, ground water, flushing capacity, key fish and wildlife habitats, etc. are prerequisites for regulations that will reflect land and water capabilities. Much resource inventory and capability information that is presently unavailable is necessary if zoning of the Maine coast is to be done correctly. The same resources are threatened with irreversible damage if it is not done immediately. While not as extensive as the data already assembled in some sates,[182] Maine has made an excellent beginning in the compilation of such information.[183] The problems involved in procuring federal or private funding for assembling such information and the proper role of the indigenous versus the outside expert in supplying the needed expertise in coastal management is probably no different in Maine than elsewhere.[184]

Even when information is available there is still the problem of translating such resource information gathered on a specific stretch of beach or water area into a comprehensive land and water use plan. One workable approach would be to designate environmental zones, establish permitted and conditional uses in those zones, establish critical areas as areas of overriding state concern and an inventory of critical state resources, promulgate shoreline restrictions to regulate permitted activity within each zone, and adopt performance standards which may apply to only one zone or across the board to all zones. This approach is similar to that being undertaken by the Coastal Planning Group of the State Planning Office and is discussed in detail *infra.*

This recommended approach is compatible with but not required by the Maine Shoreline Zoning Act.[185] The alternative to environmental zones, to assure uses based on land and water capabilities, is to make an ad hoc ruling on every municipal land use decision. This is the route now followed in such laws as the Wetlands Control Act, The Great Ponds Act, and the Site Location Law.

Administrative Responsibility

Another basic weakness both with respect to implementing the Act and its subsequent enforcement is the failure of the Legislature definitely to pinpoint responsibility at the State level. Responsibility has been given jointly to the Board of Environmental Protection and the Maine Land Use Regulation Commission with directives to the State Planning Office to act as a consultant and a coordinator.[186] The central role given to Maine Land Use Regulation Commission (LURC) is somewhat curious inasmuch as LURC has no jurisdiction in organized territories, the area covered by the Act.[187] The Board of Environmental Protection, on the other hand, has statewide jurisdiction and many responsibilities with respect to the coast under other laws that supersede or overlap its responsibility under the Maine Shoreline Act.[188] It is, therefore, recommended that the State Planning Office, and possibly LURC, remain instrumental in planning for the implementation of the Act, but that the Board of Environmental Protection be given responsibility for enforcement of the Act.

Decentralization

It is further suggested that after initial approval of a municipality's land use plan and shoreline zoning and subdivisions ordinances required by the Shoreline Zoning Act, that all development be allowed to proceed in compliance with that municipal plan, without State-level intervention or review except in the case of variances to the municipal plan, and in activity affecting critical areas or areas of overriding State concern. The State should probably be notified of application of any conditional uses under the plan and retain the option to intervene if it were thought necessary. This suggestion is in accordance with the recommendations made in a report to the Council on Environmental Quality that local issues should be left to local government and the State should concentrate on major development proposals.[189] Monitoring of local adherence to an approved land use plan might be delegated to Regional Planning Commissions or some other appropriate decentralized body.

Need to Designate Critical Areas or Areas of Overriding State Concern

There is a need to have a mechanism to designate critical areas or areas of overriding State concern. Included in this category would be land suitable for high intensity development such as industrial complexes, deep water ports, and interstate highway exchanges, wetlands, and areas of fragile ecological balance, historical structures, unique resources, productive fishery areas, and wildlife habitats. Many of these areas are already regulated under existing laws such as the Site Location Law, the Wetlands Law, and authority given the Maine Port Authority. Wilderness areas, historical sites, biological or geologically important or unique

areas and others, such as were enumerated in the proposed Natural Areas Registry[190] that was before the Legislature in its regular session, are often not subject to any State-level control.

Areas of overriding State concern imply that there should be as much State concern with wisely regulated development as in interposing a State veto in areas that should be preserved. It therefore logically follows that in some instances the State must have the power to override local option if a project is felt vital to the State. This approach of State allocation of coastal resources and designating suitable areas for particular activity was exemplified by the report of the Governor's Task Force *Energy, Heavy Industry, and the Maine Coast.*[191] The logic is impeccable, but the political feasibility is another question. This perhaps explains why the Department of Environmental Protection has never approved a development that did not have local approval despite the fact that there is nothing in the Site Location Law that requires that local approval be controlling. Compensating local communities for preserving mandatory open spaces on the one hand or distributing the burden and benefits of intensive development on the other hand must also be carefully considered.[192]

A Critical Areas bill similar to the last year's proposed Natural Areas bill (L.D. 1493) is being introduced in this year's special session as part of the Governor's legislative program. This bill would set up a critical area Review Board within the State Planning Office and provide state review of locally prepared plans for critical areas recognized by the registry board. Considerable data is already available for critical area designations on the coast, and thus it is likely that the critical areas concept will receive its initial trial there.

Need For State Level Policy Committee

Although the Department of Environmental Protection is designated to administer the Shoreline Zoning Act, there is need for a state-level policy committee to make decisions about the Maine Coast, and to designate areas of overriding State concern, be it for preservation or development. This body could also review or possibly act as an Appeals Board for municipal land use programs to see if they are in conformity with or represent reasonable modifications or amendments to the Maine Coastal Plan. The policy committee would oversee not only the workings of the Shoreline Zoning Act, but monitor other environmental and development decisions that arise under other legislation. There are a variety of options on which to pattern such a coordinating committee.[193] As one who has advocated non-proliferation of state agencies, it is recommended, if possible, that such a policy coordinating committee evolve from some presently constituted administrative mechanism such as the Governor's Cabinet meeting with outside representatives and sitting as a coastal coordinating council, or possibly an existing legislative committee.[194] In Maine, minimum participation should include Legislative leadership, municipal and regional planning representation, the University of Maine, and the Commissioners of Environmental Protection, Conservation, Marine Resources, and Transportation. The Committee could be administratively lodged in and staffed by an existing department, i.e. Marine Resources, the State Planning Office, or Environmental Protection, but it should be a completely inde-

pendent entity. Such a committee would help overcome the impossibility or even desirability of concentrating all coastal management functions in one Department and could act as a superego for agencies that have a tremendous impact on the character of the Maine Coast but are, for certain activities, exempt from most environmental laws. The Department of Transportation is a case in point. The intensity of development in presently undeveloped areas will be influenced by roads whose planning and construction is the responsibility of this Department. Planning for roads does not require clearance from a coastal management agency, and road construction is exempted from the Site Location Law.[195] Add to this the Department's responsibilities for Maine ports, waterways, ferry services, and perhaps even as protector of the public rights in the intertidal zone which are considered to be public ways.[196] It is apparent that the Maine Department of Transportation is an agency with an extremely decisive influence on the character of the Maine Coast.

FOOTNOTES

119. The Great Ponds Act (38 M.R.S.A. 422 as enacted by P.L. 1971 c. 618 S10) that relates to filling, dredging, or construction in, on, over, or abutting a great pond was formerly administered by the Forestry Department with a multi-agency advisory board. (12 M.R.S.A. 504). The law was amended to include tributaries to great ponds and artificially created ponds in 1970 (P.L., 1969 c. 551). The responsibility for enforcing the statute was transferred to the Department of Environmental Protection in 1972 (P.L., 1971 c. 618) and has recently been more rigorously enforced by wardens of the Department of Inland Fisheries and Game as development on lakes has increased.

120. 12 M.R.S.A. 4701-4711 as amended.

121. 38 M.R.S.A. 481-488 as amended.

122. 12 M.R.S.A. 4807 as amended.

123. 12 M:R.S.A. 4751-4758 as amended.

124. 12 M.R.S.A. 4811-4818 as amended.

125. 30 M.R.S.A. 4956 as amended.

126. 12 M.R.S.A. 4701-4709 as enacted by P.L., 1967, c. 348.

127. A wetland is defined as any swamp, marsh, bog, beach, flat, or other contiguous lowland above extreme low water which is subject to tidal action or normal storm flowage at any time except periods of maximum storm activity. (12 M.R.S.A. 4701 as amended).

128. Me. 265 A2d 711 (1970).

129. Me. 300 A2d. 736 (1973).

130. Me. 265 A2d. 711, 716.

131. Id. at p. 716-717.

132. See Water Quality Act of 1970 (P.L. 91-224) and guidelines issued pursuant thereto by the U. S. Corps of Engineers.

133. 12 M.R.S.A. 4751-4758 as amended.

134. See footnote 130.

135. *State* v. *Johnson*, supra at p. 713.

136. *Commissioner of Natural Resources* v. *Volpe* 349 Mass. 104, 206 N.E. 2d 666 (1965).

137. See *Dooley* v. *Town of Fairfield*, 151 Conn. 304, 197 A2d. 770 (1964).

138. See for example: *Iowa Natural Resources Council* v. *Vanzee*, Iowa, 158 N.W. 2d. 111 (1968); *Swisher* v. *Brown*, 157 Colo. 378, 422 P.2d. 626 (1965).

139. See Petitioner's Brief, Motion For Rehearing, Review and Clarification by Wetlands Control Board and State of Maine, Supreme Judicial Court December Term, 1970, Law Court Docket #1487 Decided May 21, 1970. See also *Just* v. *Marmelle County*, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972); 86 Harvard L. Rev. 1582 (1973); Sax, J.H., The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970)

140. 12 M.R.S.A. 4751-4758 as enacted by P.L., 1971, c. 541.

141. 33 M.R.S.A. 667-668 (See page 72 infra).

142. P.L., 1969, c. 571.

143. See Legislative History of Site Location Law, State Wide Zoning Law, 1970 Special Session.

144. 38 M.R.S.A. 481 as amended.

145. 38 M.R.S.A. 482 (2) as amended.

146. 38 M.R.S.A. 484 as amended.

147. 38 M.R.S.A. 481-488 as amended.

148. 12 M.R.S.A. 685-B as amended.

149. 12 M.R.S.A. 4807 as amended by P.L., 1973, c. 411.

150. 38 M.R.S.A. 482(2) as amended by P.L., 1971, c. 613.

151. 30 M.R.S.A. 4962(1) (C) (D) as amended by P.L., 1971, c. 455.

152. Me. 270 A2d. 863 (1970).

153. Id. p. 868.

154. See Legislative History.

155. See 23 Me. L. Rev. 119, fn 12 at p. 121.

156. Me. 300 A2d 736 (1973).

157. Id. at p. 753.

158. 160 Me. 164, 165 200 A.2d 543 (1964).

159. In Re *Spring Valley Development by Lakesites, Inc.*, supra, at p. 753.

160. See also Statement by Russell Train, Nominee for EPA Administrator. "It is essential to expand the public's authority over private lands if we are to provide some order and preserve some beauty in the very complex urban society of the late 20th century." (Quoted Newsletter: "Florida Coastal Coordinating Council," Sept. 1973, p. 2.

161. *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365 (1926), is a land mark case upholding traditional zoning.

162. See for instance Siegan, B.H., *Land Use Without Zoning*, D. C. Heath and Company, 1972.

163. 30 M.R.S.A. 4956 as amended.

164. *Environmental Criteria*:
   (a) Air and water pollution.
   (b) Elevation of land, relation to flood plains.
   (c) Nature of soils and subsoils.
   (d) Slope of land and effects on effluents.
   (e) Availability of streams for disposal of effluents.
   (f) State and local health and water resource regulations.
   (g) Burden on existing water supply.
   (h) Soil erosion, capacity of land to hold water.
   (i) Highway or public road congestion.
   (j) Adequate solid and sewerage waste disposal.
   (k) Burden on municipality to dispose of sewerage and solid wastes if municipal facilities to be used.
   (l) Scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas.
   (m) Conformance with duly adopted municipal development or land use plan.
   (n) Adequate financial ability to meet environmental standards.
   (o) When situated within 250 feet of water body, not adversely affect quality of water or unreasonably affect shoreline.

165. 30 M.R.S.A. 4956 (3) (L).

166. 30 M.R.S.A. 4956 (4).

167. There is a fine of $1,000 for disposing of property in an unapproved subdivision. The Attorney General is given power to enjoin public utilities that service an unapproved subdivision. (30 M.R.S.A. 4956 (4).

168. 30 M.R.S.A. 4956 (1) as enacted by P.L., 1971, c. 454.

169. "A subdivision is a division of an existing parcel of land into three or more parcels or lots within any 5-year period, whether this division is accomplished by plotting of the land for immediate or future sale, or by sale of the land by metes and bounds or by leasing. No sale or leasing of any lot or parcel shall be considered a subdivision if such lot or parcel is not less than 40 acres in size except where the intent of such conveyance is to avoid the objective of this statute." 12 M.R.S.A. 682 (2) as amended.
   See description of Maine Land Use Regulation Commission, infra, beginning at p. 73.

170. "A 'subdivision' is the division of land into 5 or more lots any one of which is less than 10 acres in size, if said lots make up an aggregate land area of more than 20 acres and are to be offered for sale or lease to the general public during any 5-year period." 38 M.R.S.A. 482(5).

171. P.L. 1973, c. 465 Sec. 1.

172. P.L. 1971, c. 535. This Act applies to shorelands of inland waters as well. Recommendations made in this article are equally applicable or easily adaptable to inland as well as marine shorelands.

173. 12 M.R.S.A. 4811 as amended.

174. 12 M.R.S.A. 4812 as repealed and reenacted by P.L., 1973, b. 564.

175. 12 M.R.S.A. 4813 as repealed and reenacted by P.L., 1973, c. 564.

176. 12 M.R.S.A. 4813 as repealed and reenacted by P.L., 1973, c. 564.

177. 12 M.R.S.A. 4814 as repealed and reenacted by P.L., 1973, c. 564.

178. The Ford Foundation provided $100,000 to the University of Maine to assist in the implementation of this Act. An additional $50,000 was granted to the Maine Department of Environmental Protection by the federal Environmental Protection Agency.

179. P.L., 1973, c. 564. The deadline was extended from June 30, 1973 to July 1, 1974.

180. 12 M.R.S.A. 4812 as added by P.L., 1973, c. 564. Presumably this amendment was introduced to overcome constitutional difficulties encountered in *Connell* v. *Town of Granby* 209 NYS 2d 379, 12 A.D. 2d 177 (1961). In this case, it is submitted, the cure is worse than any possible defect. See discussion, p. 13.

181. Most of the Maine communities that do not have zoning do not have a large enough population or tax base to generate sufficient financial resources to hire planners, engineers, legal representation for drafting zoning ordinances, building inspectors, etc. These communities have not yet tackled the rudimentary elements of traditional zoning. They are now being asked to enact land use controls on the basis of land and water capabilities. There is abundant literature prepared for specific states or localities recommending various approaches and general guidelines for utilizing information on acidity, soil types, matrices for conflicting uses, etc. (See for example *Land Use Allocation System for California's Coastal Zone*, Gruen Gruen and Associates-Sedway. Cooke, Report to The Department of Navigation and Ocean Development of the Resource Agency, State of California, October 22, 1971). This type of report would not be readily usable by a small town meeting in Maine even if the requisite highly technical and specialized resource information were available for that community. What is needed, it is submitted, is to have very clear-cut, easily understandable directions and guidelines for shoreline zoning with expertise provided at the regional and/or the State level.

Minnesota has prepared several excellent reports that explain its shoreland management act in clear but elementary terms. Supplementary Report No. 2, Shore Line Management. Elements and Explanations of the Shoreland Rules and Regulations (1971); Supplementary Report No. 3, Guide for the Implementation of County Shoreline Ordinances, (1972), Minnesota Department of Natural Resources.

Florida has published a guide for communities entitled Local Coastal Zone Management: A Handbook. Florida Coastal Coordinating Council, (1973).

182. For example see *Background Information for Framework Statewide Water and Related Land Resources Planning in Minnesota*. Technical Bulletin No. 2, State of Minnesota, Water Resources Coordinating Committee, State Planning Agency, June 1969; or *Statistical Inventory of Key Biophysical Elements in Florida's Coastal Zone*. State of Florida, Department of Natural Resources, Coastal Coordinating Council, May 1973.

183. See for example, *The Penobscot Bay Resource Plan, Maine Coastal Plan,* State Planning Office, August, 1972; *Coastal Overview: Conservation Priorities Plan,* (Draft) Reed & Andrea Under the Auspices of the Smithsonian Institute Center for Natural Area, September 1973.

184. The proposed rules for administering the Federal Coastal Management Act call for action and not more research (960.20 15 CFR June 13, 1973) with monies to be allocated for management programs, not long term research programs. The frustration of the Maine Coastal Planning Group of the State Planning Office in attempting to secure funds from other sources to do resource inventories for Coastal planning is reflected in the fact that Maine is near the bottom on the list of States in receiving federal research funds. Boiled down from all the official jargon in research requested regrets is the message that "to him that hath" it shall be added and to him that has not — it must be done through out of state consultants. In other words, the vitae of resident faculty in a university system or of state personnel to carry on a research grant is more important than the vitality of the state's commitment to coastal planning. Of course here is another paradox of coastal management. Patronizing local "research" merchants, because they are local, is not as important as assuring that the technical capability is available in the state to handle the many facets of coastal management, i.e., planning, engineering, physicists, biologists, chemists, etc. (For a period Maine had to send all oil spills to Boston for analysis to determine from which ship the spill occurred.) Perhaps states that do not have the in-house "expertise" should be given the funds to acquire such expertise on the condition that such expertise, that is either bought or developed, will be available to the State for a certain minimum period of time. The alternatives in the past have been to retain private outside consultants or tie in a Maine program as an ancillary operation to a major university-based operation elsewhere. This satisfies the legitimate consideration of having qualified personnel

handling the research, but often the special or unique situation that is apparent to persons within a state will not be considered in proper perspective. Furthermore, there may not be any follow-through on recommendations.

The alternative of using outside consultants has been often used in Maine; sometimes to supplement deficient state expertise, sometimes to duck a hot political issue, (i.e., the income tax was a subject of constant research by outside consultants until the legislature decided to pass such a tax). Recently, however, consultants have become suspect in that one allegedly reputable consultant firm, in two separate evaluations, gave contradictory opinions on the safety of tankers navigating the approaches to the proposed oil refinery at Eastport. (See *Portland Sunday Telegram*, Sept. 2, 1973, 4a.) Two recommendations for advancing coastal management would be: one, to earmark funds to enable a state to purchase or develop resident expertise, and the other, perhaps more radical suggestion, would be to award approximately 10-20% of the contract price for any research grant in proportion to the number of suggestions or recommendations that were put into practice.

185. See Working Paper, Proposed Guidelines for Mandatory Shoreline Zoning and Subdivision Controls, supra at footnote 48.

186. 12 M.R.S.A. 4813, 4814 as amended by P.L., 1973, c. 564.

187. 12 M.R.S.A. 4812 limits act to municiaalities.

188. See pages 69 et seq. infra.

189. Bosselman, F., and Callies, D., *The Quiet Revolution in Land Use*, Council on Environmental Quality, GPO, 1971, p. 14.

190. L.D. 1493 106th Legislature. Both the Federal Coastal Zone Management Act and the Senate version (S-268) of the Federal Land Use Act require the designation of areas of critical significance.

191. Published in September 1972. The reported recommended areas for heavy industrial development and exclusion of that type of development from the rest of the Maine coast.

192. Up until 1969 with the passage of the State Income Tax (P. & S. L. 1969, c. 154) municipalities relied almost exclusively on the property tax for revenue. The advent of the income tax has enabled the State to return more money to the communities. (See 30 M.R.S.A. 5055 as added by P.L., 1971, c. 478). The revenue sharing, however, has not resulted in municipalities advocating open spaces because of the constant financial crises in most municipalities. An innovative law was passed in Minnesota to encourage orderly development and the best use of land, to allow all local governments in the twin city metropolitan area to participate in the increased land values in the area, and to locate industry in the most advantageous site regardless of the financial impact on the local community. The law is known as the Metropolitan Revenue Distribution Law. It provides that each local government in the region must contribute 40% of the net growth of commercial and industrial property tax valuations after 1971 to the Twin City Metropolitan Council for redistribution to the various local governmental units according to population and need. (Minnesota Statutes Annotated 473F.01-473F.13.)

193. For example, Rhode Island, Coastal Management Council, Act 279-1971); Florida, Coastal Coordinating Council, Act 259-1970, Florida Statutes Chapter 70-259; California Advisory Commission on Marine and Coastal Resources, Act 1642-1967. California Government Code Sections 8801-8827.

194. See I *Maine Law Affecting Marine Resources*, p. 139.

195. 38 M.R.S.A. 482(2) as amended by P.L., 1971, c. 613 sec. 2. Highway construction is also exempt from the Wetland Control Act with regard to normal maintenance or repair of pre-existing ways or roads. (12 M.R.S.A. 4708 Supp.). That any state agency should be exempt from State environmental regulations and controls is paradoxical inasmuch as the standards set by the state for regulating municipal and

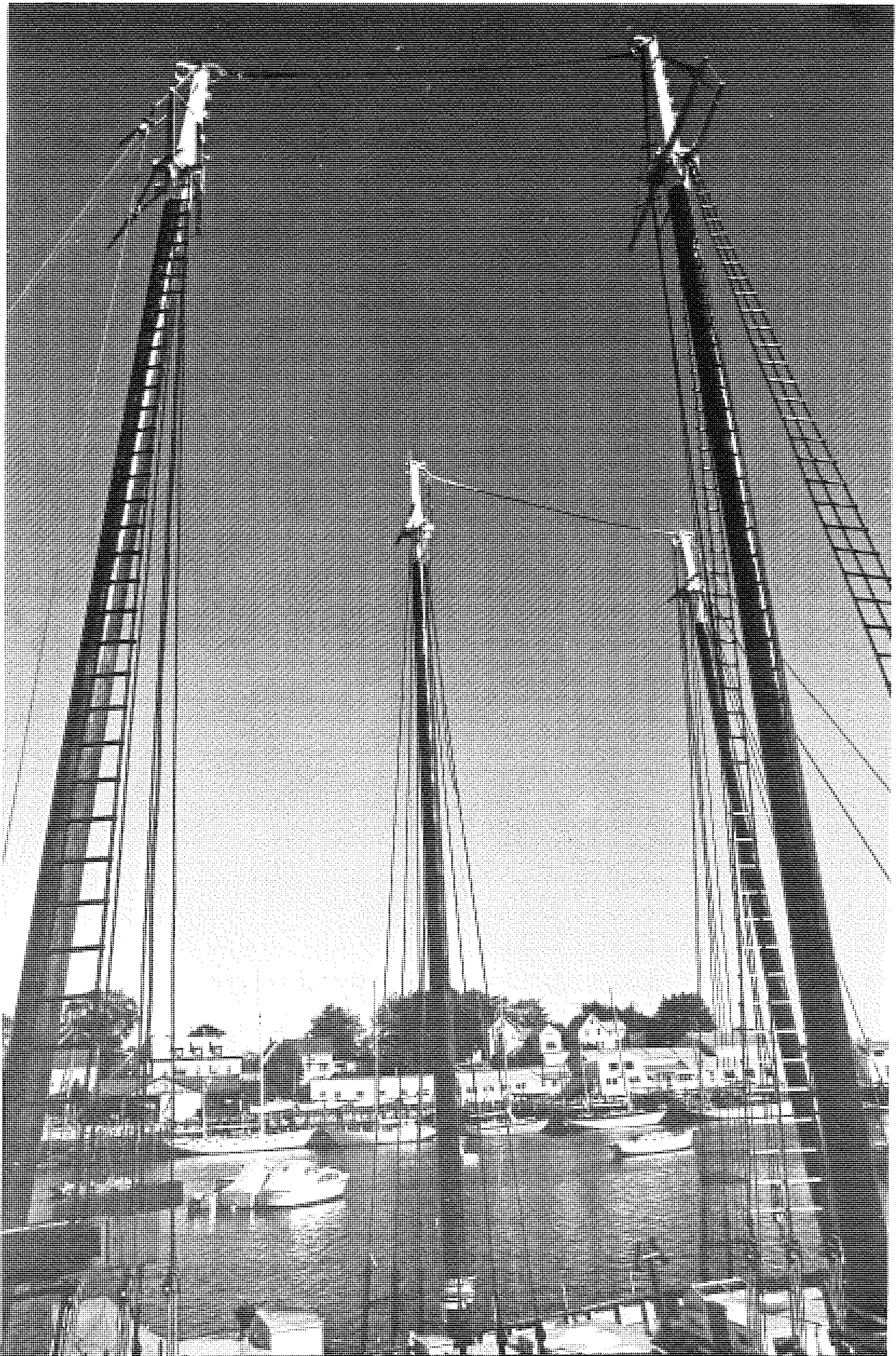
private development are supposed to represent uses and regulation of uses based on land and water capabilities, in essence model standards. To except highway construction is even more astounding in view of the tremendous environmental impact in the consumption of land that occurs from building highways. For example: Every mile of interstate freeway requires approximately 30 acres of land and every interchange devours about 80 acres (National Transportation Policy *The Doyle Report*) 87th Congress 1st Session, p. 592 (1961) Projected construction of Interstate highway by 1975 nationwide will require 1½ million acres for new rights of ways; enough sand, gravel and crushed stone will be utilized that if combined would make it possible to build a wall fifty feet wide and nine feet high around the world, and enough concrete to build six sidewalks to the moon. (U.S. Bureau of Public Roads, Department of Commerce, America's Lifelines: Federal Aid for Highways 11 (1962). The recent uproar in Hawaii against a proposed highway that was to be constructed between downtown Honolulu through the Kaulau Mountains to the windward side of Oahu ("Environmentalists Rally to Hawaiian Road Issue", *Portland Press Herald*, Sept. 6, 1973, p. 3) and the challenge to the exemption of the Maine Turnpike expansion from the Site Selection Law are probably more than fair warning that highways are no longer sacrosanct, at least in immunity from citizen concern.

The Highway Revenue Act of 1956 (23 U.S.A. 120 note e(1) (1964) which provides for future highway funding free of legislative interference does not require environmental considerations in constructing highways except for specific provisions such as preservation of parklands, control of junkyards and outdoor advertising. 49 U.S.C.A. S 1610 (1971 Supp.). The more recently passed Urban Mass Transportation Act does require an environmental impact statement. 49 U.S.C.A. 1601 (1964); See A Cure for the Highway Epidemic: A Balanced Subsidy (5 Suffolk L. Rev. 902, 909 (1971).

The National Environmental Policy Act, P.L. 190-190 Sec 2, 83 Stat. 852 42 U.S.A. 4321 (Jan. 1970) also requires all federally funded projects to file an environmental impact statement with the Council on Environmental Quality. The Maine Department of Transportation has fulfilled the U. S. Department of Transportations Policy and Procedure Memorandum PPM90-1 of August 24, 1971 in the formulation of the *Draft, Maine Action Plan*, Maine Department of Transportation June 19, 1973. With its memorandum of understandings with a variety of state department heads, its outlined procedures for coordination and review and public notifications, it probably more than adequately fulfills statutory requirements and in effect is a model of participatory bureaucracy. Two comments. The federal law has no teeth in it and the most important question remains unanswered because it remains unasked, "How should highway construction be used to guarantee the most desired location and desired level of development and conservation on the Maine Coast?

The precedent of exempting state agencies could be disastrous. The Site Selection Law does cover power lines over a certain kilowatt. The proposed Maine Power Authority Initiated Bill L.D. 1760, recently defeated in referendum, was empowered to select sites for power plants (presumably independently of the Site Selection Law) but was required to adhere to all state environmental laws.

196. See *Cochran* v. *Chase* 102 Me. 431, 67A 320 (1907); *Kean* v. *Stetson*, 22 Mass. (Pick) 492 (1821); *State* v. *Wilson* 42 Me. 2 (1856).



V MODIFICATIONS NECESSARY IN MAINE LAW TO QUALIFY UNDER THE FEDERAL COASTAL MANAGEMENT ACT OF 1972

Modifying the legal framework of the State's Coastal management structure, in accordance with foregoing recommendations, will make it an effective instrument to Save the Maine Coast. It will have the additional benefit of bringing Maine law in substantial compliance with the Federal Coastal Management Act,[197] hereinafter referred to as CZMA, which will make the State eligible for Federal coastal management funding. Specific points that should be emphasized include the following:

1. *Extent of the Coastal Zone.* In the CZMA, the coastal zone is defined as coastal waters and lands therein and thereunder seaward to the outer limit of the United States territorial sea and inland from the shoreline "only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the Coastal waters.[198]

The seaward extent of the Maine Coastal Zone should be extended to the extent of Maine's territorial waters. Since municipalities have no jurisdiction of land below low water mark, except as provided by the statute,[199] this extension would impose no additional duties on municipalities except to require the intertidal area to be zoned.

Consideration should be given to the adequacy of the 250 foot strip. The CZMA allows a planning area larger than the management area. In Maine, the first tier of coastal communities has been designated by the Governor as the planning area whereas the 250 feet has been established by the Legislature as the management area.

2. *Permissible Land and Water Uses.* The establishment of the proposed environmental zones and designated uses for each zone would satisfy the CZMA requirement for defining what constitutes permissible use of the coastal zone. Similar zones could be established for water areas.

3. *Critical Areas or Areas of Overriding State Concern.* A registry of critical areas and criteria for determining inclusion[200] should be provided for by Maine law. The relationship of municipal v. State control with respect to these areas should be clarified.

4. *Economic Considerations.* The CZMA requires that in developing management programs "consideration be given to ecological, cultural, historical and aesthetic values, as well as to the needs of economic development." Provision must be made "for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements that are other than local in nature."

This requirement means that economic consideration must be thrown into the balance. It does not mean that economic aspects must be controlling.

This portion of the CZMA would also seem to require a State to provide for the allocation of land areas to meet the demands of industry and power.[201]

5. *Performance Standards and Shoreline Restrictions.* The CZMA requires that a State program detail how a State intended to exert control over land and water uses. No specific technique is required.

The responsibility to establish minimum guidelines, given to the Board of Environmental Improvement, the Maine Land Use Regulation Commission and the State Planning Office under the Maine Shoreline Zoning Act, is broad enough to

authorize general performance standards and specific shoreline restrictions.[202] Once such a management program is promulgated, it would be advisable to have legislative endorsement of this general approach.

6. *Property Restrictions — The Necessity to Obtain a Fee Simple Interest.* The CZMA requires that the states have enabling legislation to acquire property interests when necessary to achieve conformance with the management program. The State probably already has sufficient power to acquire such interests for park and open space requirements, but does not have the power, and may need a constitutional amendment to give a coastal management agency the power to acquire sites for industrial development.[203] Of course, State power is a nullity if sufficient funds are not available to the State for these purposes. The CZMA authorizes no funds for purchase of interests in land other than those designated for purchase of estuarine sanctuaries.[204]

7. *Citizen Participation.* The CZMA puts strong emphasis on citizen participation in the formulation and adoption of a coastal management program. To date, extensive exposure to the State's coastal management plans and aspirations have not been afforded the general public except in selected areas where the coastal planning activities of the State Planning Office have been undertaken.[205] An example of what proper background information, resource capability inventories, and adequate technical assistance can accomplish is reflected in the newly adopted zoning ordinance in the Town of Stonington[206] that previously did not have a resource plan nor a zoning ordinance.

Advantages of Bringing State Law into Conformity With CZMA

The CZMA does not require state participation. The incentives to participate are (1) federal money for the planning and administration of coastal management programs; and (2) the necessity for activities requiring a federal permit to conform to the State's approved management program. The existence of a state coastal management program will facilitate obtaining a permit; the absence of a state program might mean that a federal project could be commenced against a state's wishes.[207]

FOOTNOTES

197. The basic requirements of this Act are:

1. Identify the boundaries of the state's coastal zone. The state may distinguish between planning areas and management areas.

2. Define "what shall constitute permissible land and water uses within the coastal zone which have a direct and significant impact on coastal waters." In establishing permissible uses "there must be adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements that are other than local in nature." Examples would be "generating plants, refineries, and deep water ports."

3. An inventory and designation of areas of particular concern within the coastal zone.

4. Identification of the means by which a state program will exert control over land and water uses including a description of the legal framework, — relevant constitutional provisions, legislative enactments, regulations, judicial decisions, — to which

the coastal areas are now subjected or will be regulated by under the State's management plan. Controls must exist or be proposed to:

a. regulate land and water use
b. control development in the coastal zone
c. resolve conflict among competing uses
d. acquire property interests when necessary to achieve conformance with the management program.

5. Establish broad guidelines of priority of uses in particular areas.

6. Design an organizational structure including establishing the responsibilities and interrelationship of the various levels of government.

A State's management program may use any one or a combination of the following techniques for the control of land and water uses:

1. State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

2. Direct State land and water use planning and regulation, or

3. State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearing.

Additional requirements are:

1. A State must coordinate and consult with agencies at the various levels of government, as well as private property owners, in the formulation of a management program.

2. Public hearings must be held in the development of a management program.

3. The governor of the State must designate a single agency to receive and administer the grants for implementing the management program.

4. The governor must review and approve the program. SOURCE: Proposed Rules. 15 CFR, Part 960 Coastal Zone Management Program Development Grants. Federal Register, Vol. 38, Number 113, Wednesday, June 13, 1973. See Coastal Zone Management Act of 1972 (Public Law 92-583; 86 Stat. 1280).

198. Federal Coastal Management Act. Sec. 304 (a).

199. See Appendix A infra.

200. See Proposed Guidelines for Mandatory Shoreline Zoning and Subdivision Control, supra at footnote 48 and footnote 232 for suggestions as to what should be included in this category. The Natural Areas Registry proposed by L.D. 1493 speaks to many types of areas and items that should be included. The concept of areas of overriding State concern would also, in this recommendation, include general areas, i.e. intertidal zone, and types of activities, i.e. heavy industry.

201. Federal Coastal Management Act. Sec. 306 (e) (8). The concept of national interest as it gradually emerges from new federal legislation could further aggravate an already questionable posture for the State of Maine. If, as appears likely, it should be thought to be in the national interest for the coast of Maine to accept its "fair share" (however that might be defined) of power plants, oil refineries, and tourists, and thereby more closely resemble other developed areas of the country. Federal-State interjurisdictional trouble is in sight. Accepting federal assistance under such conditions is unthinkable. Maine is unique because it isn't like everywhere else and it is clearly in the national interest to recognize that fact.

202. 12 M.R.S.A. 4813 as added by P.L., 1973, c. 564.

203. See *Opinion of the Justices*, 152 Me. 440, 131 A. 2d 904 (1957).

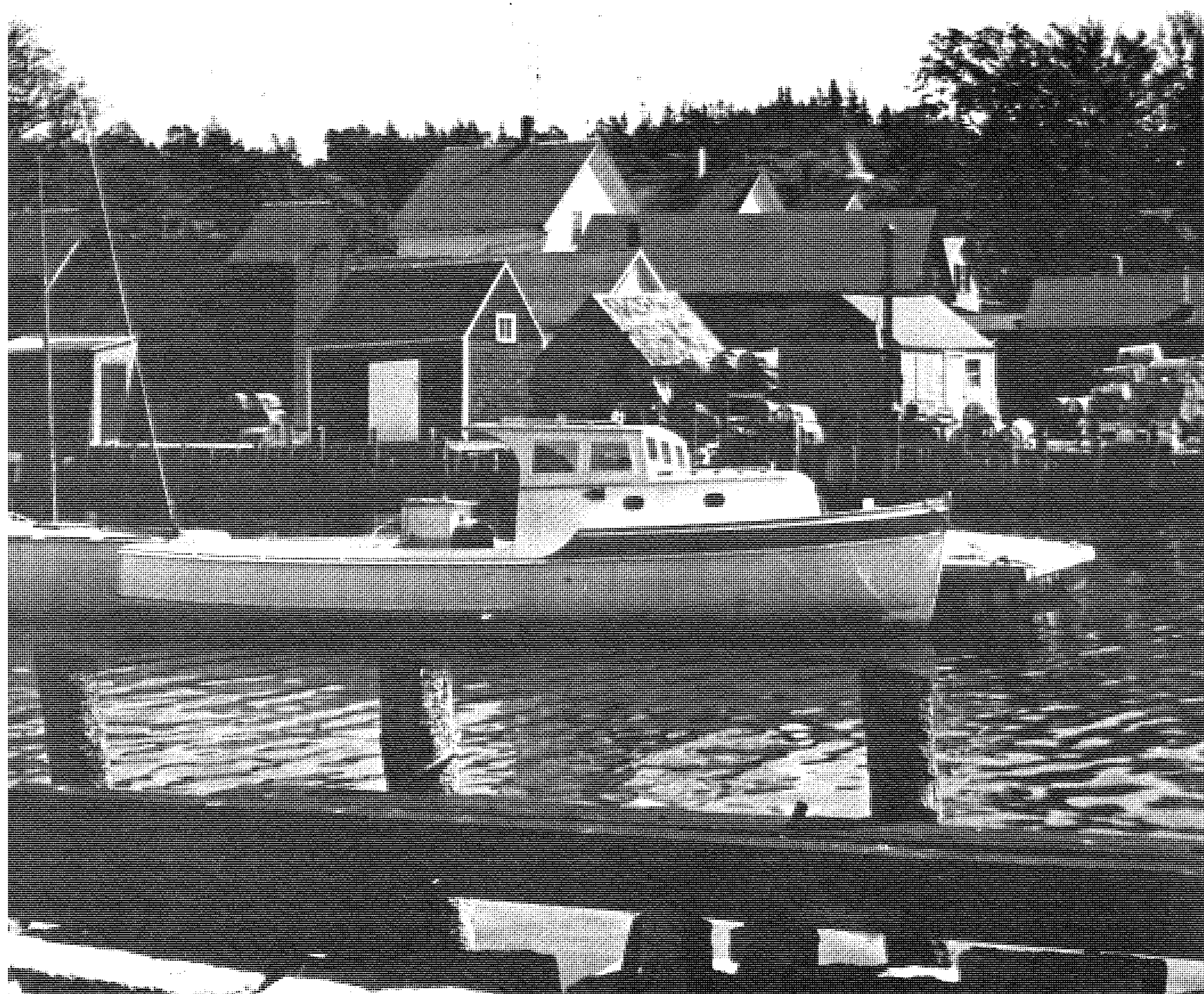
204. Sec. 312 Federal Coastal Management Act of 1972.

205. Sec. 308. Thus far the State Planning Office, in inventorying land and water resources capability for the Penobscot Bay area and the Hancock County area, has encouraged extensive public participation activities. In addition, a public opinion poll of the entire state has recently been conducted by the State Planning Office to obtain public reaction to attitudes and opinions on a variety of state issues. Building on the results

of this poll, the Coastal Planning Group intends to prepare alternative policies for each area of the coast to form the basis for state and local planning.

206. July, 1973

207. See Louisiana Coastal Law, Report No. 8, Louisiana State University Law Center, Dec. 1972 for discussion of federal Coastal Zone Management Act of 1972.



VI SUGGESTED APPROACH TO COASTAL MANAGEMENT

In the preceding sections reference has been made to environment zones with designated and conditional uses, performance standards, shoreline restrictions, and areas of overriding state concern and critical state resources. These were suggested as a means of implementing the Maine Shoreline Zoning Act, integrating the many environmental laws presently in effect in Maine, and bringing Maine law in compliance with requirements of the Federal Coastal Management Act of 1972. Details for this proposal have been dealt with more specifically elsewhere.[208] A general discussion of these concepts seems herein warranted to evaluate their usefulness for Maine.

Environmental Zones.

Three Environmental zones are recommended for all of Maine even though their legal efficacy under the Shoreline Zoning Act would be limited to only 250 feet from highwater mark. These zones may include areas presently designated by one or more traditional type zones. Uses for these zones, designated by the state, should be illustrative of the types of uses for which the zone was designed. The adequacy of municipal ordinances will be measured according to their adherence to these broad state environmental zones. Municipalities should be granted the option of establishing their own uses by zones provided that such uses are in conformity with the purpose of the State zones and compatible with the tolerance of the land and water areas for such uses. The zones initially recommended for the Coast of Maine but with potential application throughout the State are:

Resource Protection Zone
Resource Management Zone
Development Zone

Environmental zones were first used on Hawaii for State level zoning. Other states have adopted similar type zones for shoreland areas.

Hawaii[209]
Urban District
Conservation District
Agriculture District
Rural District

Washington[211]
Natural Environments
Conservancy Environment
Rural Environment
Urban Environment

Wisconsin[213]
Conservancy Districts
Recreational Residential
General Purpose Districts

Florida[210]
Preservation Areas
Conservation Areas
Development Areas

Minnesota[212]
Natural Environment
Recreational Development
General Development
Critical Lakes

Adirondack Park Agency[214]
Hamlet Areas
Moderate Intensity Use Areas
Low Intensity Use Areas
Rural Use Areas
Resource Management Areas
Industrial Use Areas

In some states permitted uses are specifically set forth.[215] In other jurisdictions, uses are merely illustrative of what the purpose of the zone is, it is left to the local governmental body[216] to determine permissible uses in accordance with local characteristics and preferences. In some jurisdictions no uses are suggested.[217] Provision should be made for conditional uses and variances in whatever formula adopted.

Performance Standards.

The term performance standard is used to designate a concept which includes but is a broader term than shoreline restrictions. Performance standards can provide the substance from which zoning ordinances are drafted but they can also be utilized as general guidelines without going into any degree of specificity. For instance, in Florida, shoreline zoning performance standards are performance-oriented rather than means-oriented.[218]

There was a time when general standards, cast into the context of traditional zoning would have been considered unconstitutionally vague, arbitrary, unreasonable, or an improper delegation of legislative authority.[219] But this legal underpinning has been subject to constant erosion. The environmental criteria in the Wetlands Control Act[220] and the Site Selection Law[221] have survived constitutional challenges with surprising alacrity. It cannot be seriously doubted that the similar type criteria contained in the Municipal Subdivision Law would fare equally as well. This metamorphosis has occurred, by a change in judicial attitude accompanied by a change in the semantics. By calling these statutes not zoning but only "in the nature of zoning" Maine law requiring strict adherence to specificity has been allowed to be dilluted. Perhaps a more accurate description of these new laws would be to describe them as constituting *non*-Eculidian zoning in that they do not require a systematic plotting of lots forming "cookie cutter" land patterns.[222] These general performance standards[223] contain neither scientific measurements nor a scientific level of performance.[224]

Shoreline restrictions on the other hand, as used in this analysis, refer to standards of more precise, objectively determined criteria. Examples would be provisions of the State Plumbing Code, restrictions on removal of vegetation, minimum lot sizes, setbacks, and frontages. Most federal environmental legislation provides for regulations of this nature.[225] Many shoreline restrictions are presently contained in Maine law; others have been suggested.[226] These specific types of restrictions, under the Shoreline Zoning Act and recommendations made herein, should be incorporated into municipal zoning ordinances.

Legal Aspects of Performance Standards.

In attempting to design a land use system that will protect land and water capabilities, it is of course important that performance standards reflect these resource capability objectives. Sometimes the requisite amount of data is not available to enact performance standards that will assure this result and the question is raised whether the constitutionality of such standards will be upheld if they are not scientifically precise. One author, in the context of industrial performance standards, has suggested that each standard must contain both a scientifically valid means of

measurement and a scientifically known and acceptable level of performance or it will be arbitrary and unreasonable.[227]

A better view would seem to be that it is extremely doubtful that courts will require all standards to be in terms of scientific measurement and scientifically known and acceptable levels of performance in order to be deemed reasonable.[228]

> Rather . . . it is submitted that at a maximum, reasonableness requires inclusion of scientific measurements, if it exists and its employment is administratively feasible. If there is no feasible scientific method of measurement available then the best method available, with judicial deference being granted to local legislative determinations as to what is best, will be and should be deemed reasonable. In other words reasonableness will not seem to require precise criteria when it is impossible or impracticable.[229]

The above speaks also to any criticism of vagueness as well as reasonableness. The Maine Supreme Judicial Court has not been bothered by imprecise, objectively nonmeasurable, criteria in approving standards set in the Site Location Law[230] and the Wetlands Control Act.[231] While these standards have not troubled the Court, a developer may have more trouble in determining in advance whether his particular proposal would meet the general standards.

Critical Areas or Areas of Overriding State Concern

Identification of critical areas is the key to integrating State level environmental zoning with municipal effort in the same field. The concern can be a type of activity, an activity of a particular magnitude, a type of resource, a type of area, or a specific unique area, location, structure or resource. The responsibility of the State should be to concentrate its attention on these areas and to leave the remainder of the coast or land areas, subject to general overall State direction, to the management of the municipalities.[232]

Areas of overriding State concern may be found in any of the three recommended environmental zones and if so found may necessitate more stringent controls and restrictions than would otherwise be warranted by the zone. Furthermore, to protect fully some of these areas, it may be necessary to purchase or to take them by eminent domain. Adequate fiscal and legal provisions should be included in any coastal management plan to provide for this eventuality.

FOOTNOTES

208. See footnote 48.

209. State Land Use Commission, Chapter 98 H, Revised Laws of Hawaii.

210. See *Recommendations for Development Activities in Florida's Coastal Zone*, State of Florida, Department of Natural Resources, Coastal Coordinating Council, April 1973.

211. See State of Washington, Department of Ecology, *Final Guidelines Shoreline Management Act of 1971*, June 1972.

212. *Statewide Standards and Criteria for Management of Shoreline Areas of Minnesota.* Minn. Reg. Cons 70. 1970 Edition.

213. Wisconsin Statutes, Section 59.971.

214. *Adirondack Park Land Use and Development Plan and Recommendations for Implementation.* Adirondack Park Agency, March, 1973.

215. Minnesota

216. Washington

217. Florida

218. Recommendations for Development Activity in Florida's Coastal Zone, supra, at p. 1.

219. *Waterville Hotel Corp.* v. *Board of Zoning Appeals*, Me. 241 A2d 50 (1968) *Philips Petroleum* v. *Zoning Board of Appeals*, Me. 260 A2d. 434 (1970).

220. *State* v. *Johnson*, supra

221. *Spring Valley Development Corporation by Lakesites, Inc.* supra

222. McDouglas, Luther L. Performance Standards: A Viable Alternative to Euclidean Zoning, 47 Tulane Law Review, 255 (Feb. 1973) p. 264. Mr. McDougal notes that performance standards can be used in connection with zoning. In fact, a few communities have community-wide performance standards. For one example see Gillispie, *Industrial Zoning and Beyond: Compatibility Through Performance Standards*, 46 J. Urban L. 723, 730 (1969).

223. 47 Tulane L. Rev. p. 271.

224. An example of a performance standard from the State of Washington Guidelines for the Shoreline Management Act of 1971 would meet this description.

Commercial Development

Commercial developments are those uses which are involved in wholesale and retail trade or business activities. Commercial developments range from small business within residences to high-rise office buildings. Commercial developments are intensive users of space because of extensive floor areas and because of facilities, such as parking, necessary to service them.

Guidelines:

(a) Although many commercial developments benefit by shoreline location, priority should be given to those commercial developments which are particularly dependent on their location and/or use of the shorelines of the state and other developments that will provide an opportunity for substantial numbers of people to enjoy the shorelines of the state.

(b) New commercial developments on shorelines should be encouraged to locate in those areas where current commercial uses exist.

(c) An assessment should be made of the effect a commercial structure will have on a scenic view significant to a given area or enjoyed by a significant number of people.

(d) Parking facilities should be placed inland away from the immediate water's edge and recreational beaches.

Final Guidelines Shoreline Management Act of 1971, State of Washington, Department of Ecology, 1971, p. 11.

225. See Muskie, E. S. and Cutler, E. R., A National Environmental Policy: Now You See It, Now You Don't, 25 Me. L. Rev. 163 (1973).

226. 1. *Minimum Shorefrontage for Principal Buildings* (See No. 4 below).

Resource Protection Zone	300 feet
Resource Management Zone	150 feet
Development Zone	75 feet

In order to encourage clustering of buildings and the maintenance of undeveloped shoreline, as an alternative to minimum lot widths, shoreline development may also take place upon the following approximate overall intensity of principal buildings (other than boathouses) per linear mile of shoreline or proportional fraction thereof.

Resource Protection Zone 20 principal buildings per linear mile
Resource Management Zone 60 principal buildings per linear mile

2. *Minimum Setback from Normal Highwater Mark*
Minimum setback of all principal buildings or accessory structures in excess of 100 square feet (except boathouses) shall be
A. In areas where development exists on both sides of a proposed building site, water setbacks may be varied to conform to the established setbacks.
B. In areas of unusual topography or substantial elevations above the sea level, the water setback may be varied to allow a riparian owner reasonable use and enjoyment of his property.

3. *Minimum Lot Sizes.*
Resource Protection Zone 50,000 square feet
Resource Management Zone 20,000 square feet
Development Zone 10,000 square feet

4. *Intensity Guidelines*
The overal intensity of development shall not exceed approximately
Resource Protection Zone 20 principal buildings per sq. mile
Resource Management Zone 125 principal buildings per sq. mile
Development Zone In accordance with local option

227. Schulze, Performance Standards in Zoning, 10 J. Air Pollution Control Ass'n. 156, 158 (1960); 47 Tulane L. Rev. 270.

228. 47 Tulane L. Rev. 272

229. Id. at p. 272-3

230. *Spring Valley Development by Lakesites, Inc.*, supra.

231. *State* v. *Johnson*, supra

232. For example: *General Areas of Overriding State Concern:*
1. All land from normal high tide to the extent of Maine's territorial sea.
2. Productive wetlands in the intertidal zone.
3. Productive wetlands above mean high tide.
4. Sand and gravel beaches over one-half mile in length and adjacent land.
5. Dunes.
6. Harbors of depths over so many meters.
7. Existing and potential heavy industrial areas.
8. Land areas one-half mile from state and federal park entrances.
9. Land areas one-half mile from regional airports.
10. Land areas one-fourth mile from major road exchanges.
11. Rivers and corridors of scenic, wild, or recreational value.
12. Rare plant communities.
13. Habitats of rare and endangered species.
14. Key wildlife habitats.
15. Productive shellfish areas.
16. Prime aquaculture sites
17. Biologically significant estuaries, off-shore areas.
18. Elevations of 2,500 feet or more.
19. Unique features, including gorges, waterfalls, and geological formations.
20. Scenic vistas.
21. Sites or structures of unique archeological or historical importance.

Types or Intensity of Activity:
1. All development that falls under the Site Selection law.
2. All development, modification, or alteration of natural areas and structures identified as Critical State Resources.
3. All development in 250 feet shoreline areas in municipalities that have not adopted land use programs.
4. All development in areas designated by the State as Resource Protection areas prior to approval of a municipal land use plan by the Department of Environmental Protection as meeting the requirements of the Mandatory Shoreline Zoning Law.

VII RECOMMENDED LEGAL AND ADMINISTRATIVE FRAMEWORK FOR COASTAL MANAGEMENT IN MAINE

The following recommendations are designed to coincide with the Mandatory Shoreline Zoning and Subdivision Control Law, to reflect needed modifications or amendments to present Maine Law, and to integrate all existing laws that relate to development of the Maine Coast into a workable administrative and legal framework. The structure is predicated on the philosophy that the overriding State interest in the Marine environment must be recognized and forcefully established. This paramountcy, however, should not be asserted to the exclusion of municipal involvement in and support for coastal management decisions and any other State-oriented land use plans.

ONE

Three environmental zones shall be established for zoning the coast of Maine. They are:

Resource Protection Zone
Resource Management Zone
Development Zone

The State Planning Office, in cooperation with the Department of Environmental Protection, shall draw up descriptions of these zones, permitted and conditional uses within each zone, intensity guidelines and shoreline restrictions for each of the zones; and general performance standards which shall be applicable to all zones. These zones shall be used as the basis for measuring the adequacy of local ordinances in coastal communities and are essentially similar and compatible to the zones recommended in the model ordinance and guidelines prepared by the State Planning Office for the Shoreland Zoning Law.

TWO

The State Planning Office shall compile a list of critical areas of overriding State concern.

THREE

Based upon the best available resource information that it has researched, compiled or assembled, the State Planning Office shall classify the entire Maine coast by one of these environmental zones. This classification with the suggested uses, intensity guidelines, shoreline restrictions, and general performance standards shall constitute the Maine Coastal Plan.

FOUR

Municipalities shall prepare a comprehensive plan and classify land in the municipal jurisdiction within the framework of the three environmental zones. An environmental zone may encompass more than one previously established municipal zone. The municipality will establish permitted and conditional uses for these environmental zones. Ordinances establishing such uses, prescribing intensity guidelines, shoreline restrictions, and general performance standards, promulgated in the spirit of and in general conformance with State standards, shall control all activity in the 250' shoreline areas.

FIVE

The municipality shall submit its land use plan and Shoreline Zoning and Subdivision Control Ordinances to the State Planning Office and The Department of Environmental Protection.

SIX

The Department of Environmental Protection shall approve such Plan and Ordinances if such land use plan and ordinances correspond with the purpose of the Maine Coastal plan, the objectives of the Shoreline Zoning Act, and the land and water capabilities of the municipal land. A municipal plan that is approved by the Department of Environmental Protection shall constitute an amendment to the Maine Coastal Plan.

SEVEN

Any subsequent modification of a municipal land use plan that changes permitted uses, shoreline restrictions, intensity guidelines, performance standards or involves more than 10 acres, must be approved by the legislative body of the municipality and the Board of Environmental Protection after appropriate notice and hearing. Such modification may originate with the Legislature, the Board of Environmental Protection or the municipality.

EIGHT

After approval by the Board of Environmental Protection of a municipal land use plan and ordinances, development plans approved by a municipality shall not require State review under the Shoreline Zoning Act except in areas designated as of overriding State concern or involving a critical State resource. The Department of Environmental Protection must be notified of a proposed variance and shall have the option to intervene.

NINE

The Department of Environmental Protection shall not grant approval for development activity in any municipality that opposes such development unless it involves a previously designated critical area.

TEN

Municipal Land Use plans and shoreline zoning and subdivision ordinances shall be submitted to the Department of Environmental Protection by July 1, 1975. A failure by the Department to approve, disapprove or recommend modification of the municipal program within 60 days shall constitute a conditional approval; a failure by the Department to act within six months shall constitute final approval.

ELEVEN

Any land use controls, including zoning ordinances and subdivision regulations, that have been adopted by a local government before July 1, 1975, shall remain valid with respect to authorized developments that have commenced prior to that effective date, providing that such authorized development is not in conflict with any other State law.

TWELVE

A municipality may protest any adverse ruling by the Department of Environmental Protection to the Superior Court. The local land use program or regulation shall prevail if the Court finds that the contested provision adheres to the purpose and intent of the Act and accompanying guidelines, or that, because of the characteristics of the community or factors peculiar to the locality, failure to approve would result in undue hardship to the community.

VIII SUMMARY AND CONCLUSIONS

In the foregoing analysis, paradoxes inherent in Saving the Maine Coast, have been considered. These paradoxes concern for whom the Maine coast should be saved and for what. It has become apparent that dedicating the coast to the "highest and best use" of recreation is not in and of itself a guarantee that the coast will be saved; nor is allocation of certain portions of the coast for industrial development necessarily fatal to its preservation.

The urgent public necessity for management of the coast in accordance with land and water capabilities is obvious. Attention is focused on the coast and inland shorelines because of the concentration of population adjacent to water bodies and the relentless pressures brought to bear on these areas. What is less obvious is that coastal management is merely one aspect of environmental management. Any legal framework designed for the coast must be equally applicable, or easily adaptable, to all land and water areas of Maine.

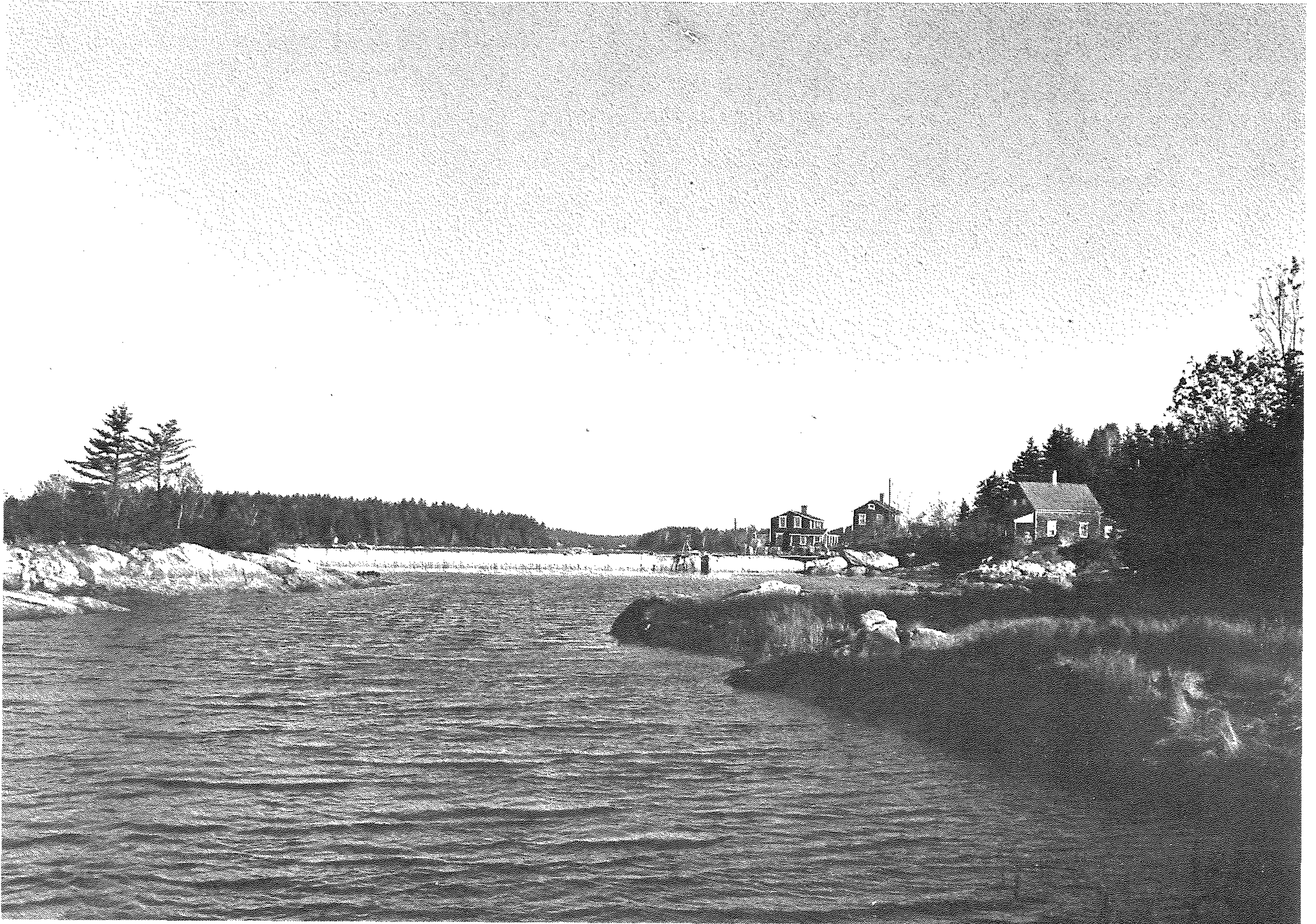
It has become apparent that positive action is needed to direct and regulate development be it to prevent, control, or actively encourage its growth. Maine law is not yet adequate to assure the highest and best use, however defined, of the Maine coast. Its effectiveness is limited to reacting to demands made on the coast. Development is presently regulated by a plethora of laws, with overlapping municipal and state jurisdiction, which are often burdensome or cumbersome to administer and enforce. The positive presence of the State in coastal management, which should be paramount, is yet to be adequately exercised. This presence, should not be exercised as a champion of preservation, although it is uncontrovertible that there are certain areas of the coast that must be strictly and uncompromisingly preserved. Nor should the presence be exercised as a champion of development, although it is unrealistic to deny the necessity and often desirability of some development. Rather we see the State presence as an advocate of conservation, defined as management of land and water areas in accordance with natural tolerance and carrying capacity. Just as we are admonished against laying up treasures on earth, so should we be admonished against hoarding the earth itself. Land and water areas should be fully and wisely used and reused but used in such a manner that irreversible damage is avoided. As with the rhythm of the tides, there is a time and place for development and a time and place for withdrawal which must vary from place to place and from season to season.

To assure that there is no irreverisble damage, it is submitted that it will be necessary to amend the "Social Contract." The legal climate must reflect the fact that the sanctity of private property must be subordinate to and yield to the trust imposed on this property for present and future generations. The absolute fee in private property must be a defeasible fee if the land or water area is used in a way which will violate this trust. This is basically what coastal management and environmental laws are all about. Although precise ordinances or particular restrictions must be constantly revised and refined as presently inadequate knowledge of the environment and ecological consequences of a particular activity is enhanced, the philosophy must remain intact.

This analysis and observations have been made about Maine, but they have more universal validity. For just as "every man is a piece of the continent, a part of the main,"[233] in Maine, as elsewhere, we stand on the shore to derive strength from the land and renewal from the sea.

FOOTNOTES

233. No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is less, as well as if a promontory were, as well as if manor of thy friends or of thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls, it tolls for thee. —John Donne, Devotions XII (1626).



IX APPENDIX: CATALOGUE OF MAINE LAW APPLICABLE TO COASTAL MANAGEMENT

REGULATION OF THE INTERTIDAL ZONE

Since the third day when the water was separated from the dry land,[234] the intertidal zone has been subjected to both land and water regulations. At English common law, private ownership stopped at high water mark. The King owned from high water mark to the extent of the territorial sea in a proprietory as well as in a sovereign capacity as trustee of the public rights of navigation and fishing.[235] The Colony Ordinance of 1641-47[236] modified common law to allow private ownership in the intertidal zone subject to the public servitude of navigation and fishing. This pattern of land ownership was adopted as the common law of Maine at the time of its separation from Massachusetts.[237] The Colonial Ordinances have been frequently reinterpreted by the Maine Supreme Judicial Court in light of changing conditions[238] but they have been seldom modified by statute.[239]

Public rights in the intertidal zone in Maine have been liberally construed.[240] Before restrictions placed on the owner by enactment of laws administered by the U.S. Corps of Engineers, such as the 1899 Rivers and Harbors Act,[241] and the recently enacted Maine Wetlands Control legislation,[242] however, a private property owner could defeat the public rights by filling in his flats or beach area.[243] After the intertidal zone was so filled, it assumed the same legal characteristics as the adjoining upland.[244] This power of the owner to defeat public rights has been held to be defeasible, however, because of the nature of the qualified fee which the owner of intertidal land possesses.[245] Similar results have recently been reached in other jurisdictions on the theory that such obstructions would interfere with the flow of navigable waters and the public right of navigation rather than being predicated on a qualified title [246] to the lands underneath the waters. On the basis of the interpretation of the Colonial Ordinances in Maine and Massachusetts, the Maine Legislature as defender of the public rights, has the authority to prohibit certain activities by the riparian owner on his own flats. This could include prohibitions against building fences or other obstructions from high to low water mark. To date, the Legislature has not enacted, or as far as is known even considered, such a restriction.

The Wetlands Control Act[247] requires after municipal approval, a permit from the Department of Environmental Protection to dredge, fill, otherwise alter, or dispose of sanitary sewage in a coastal wetland; the Wetland Protection Act,[248] which has not been extensively used to date, authorized the Department of Environmental Protection to place restrictions on coastal wetlands. The Department is given the option of removing such restrictions or acquiring the land so restricted by purchase or eminent domain if such restrictions are adjudicated to be a confiscatory taking.[249]

Other laws relating to the intertidal zone include enabling legislation for municipal shellfish ordinances[250] and provisions for the State[251] and municipalities[252] to lease land in the intertidal zone for aquaculture.

As previously mentioned, there is uncertainty as to whether the Maine Shoreline Zoning Law applies to the intertidal zone or whether the 250 feet[253] is to be measured only landward. Although this area is covered by the Wetlands Legislation, it should be included in the Shoreline Zoning Act so municipalities could plan for

and zone to assure the preservation of valuable wetlands rather than handling each decision for a permit on an ad hoc basis. The jurisdiction of the Federal Coastal Management Act,[254] it should be noted, extends to the extent of the United State's Territorial Sea.

MARINE WATER AREAS:

Laws that relate to municipal authority to regulate activity in marine waters include provisions for harbor masters,[255] harbor pilots,[256] licenses for construction of wharves and weirs in tidal waters,[257] and initial ruling on permits for alteration of coastal wetlands under the Wetlands Control Act.[258]

Laws that relate to the responsibility of State agencies to manage water areas include:

Department of Marine Resources:[259]

Fishery laws and regulations, research on fisheries, granting leases for aquaculture, advising the U.S. Corps of Engineers on suitable sites for disposal of spoil or ecological effects of other Corps activity, and maintaining records of all grants, leases, licenses, or permits granted for activity in marine waters.

Department of Transportation:

Maine Port Authority is charged with acquiring, maintaining, and operating harbor and port facilities.[260]

Department of Conservation:

Bureau of Recreation. Establishing uniform system of marking Maine waters, removing minor obstacles to navigation, and establishing safety regulations for areas of recreational boating and water contact sports.[261]

Keep Maine Scenic Law. Responsibility for maintaining the general appearance and natural beauty along highways, waterways and beaches.[262]

Maine Mining Bureau. Granting leases or licenses to prospect for hard minerals[263] on lands owned or held in trust by the state. (This includes lands under tidal estuaries and submerged lands in Maine's territorial sea.); regulate allocation of gas and oil production.[264]

Coastal Island Registry. Establishment and maintenance of Registry of Titles to all coastal islands.[265]

Bureau of Watercraft Registration and Safety. Register boats and make regulations for their safe operation in conformance with U.S. Coast Guard requirements.[266]

Department of Health and Welfare:[267]

Responsibility of assuring the fitness of shellfish for human consumption by monitoring pollution of coastal waters and the concentration of contaminates in shellfish. Responsibility for monitoring the safety of coastal waters for water contact sports.

Department of Environmental Improvement:

Licensing of waste discharges into marine waters and monitoring of water

quality;[268] licensing the construction of facilities in, on, or above tidal waters or subtidal land in connection with waste discharge licenses.[269] Administration of the Coastal Conveyance of Petroleum Act to deal with hazards posed by the transfer of oil to the marine environment by licensing of oil terminals, by adoption of rules and regulations[270] to govern such transfers. Administration of the Site Selection Law. The effect of this law was specifically extended to water areas by a 1972 amendment.[271]

STATE ZONING OF MARINE WATER AREAS.

There is no law in Maine that authorizes either the State or municipalities to zone water areas. This power is inherent, however, in State sovereignity; it is recommended that the State undertake zoning of water areas either under an amended Shoreline Zoning Act or under other appropriate legislation.

INLAND WATERS:

Although this analysis is limited to management of the Maine coast, mention should be made of two important laws relating to the shoreline of Great Ponds. The first is known as the Great Ponds Act.[272] A person must obtain a permit from the Department of Environmental Improvement to construct a bridge, causeway, marina or other permanent structure; or to dredge, fill or deposit fill in, on, over or abutting a great pond or its tributaries. The other law is the recently enacted Great Ponds Classification Act.[273] The act instructs the Department of Environmental Improvement to establish a classification system for great ponds in accordance with statutorily prescribed criteria and assign such classification to each great pond. The Department may establish guidelines for sewerage disposal and collection systems and other waste control systems to control, abate and prevent environmental damage.[274] Part of this responsibility is implicit or explicit in duties already assigned to the Department under other laws.

The Department of Inland Fisheries and Game has been assigned the responsibility for issuing permits for bulldozing, filling or dredging between the banks of a river, stream or brook.[275] The overlap of the jurisdiction of these two agencies is obvious if the watercourse is flowing into rather than leading out of a Great Pond.

LAWS RELATING TO SPECIFIC SOURCES OF POLLUTION

Department of Environmental Protection

Water Discharge licenses[276]
Air Emission, Protection, and Improvement[277]
Prohibition Against Dumping Out of State Waste[278]
Maine Sanitary District Enabling Act[279]
Maine Solid Waste Management Act[280]
Conservation and Rehabilitation of Mining Land[281]

Pesticide Control Board

Maine Pesticide Control Act[282]

Department of Health and Welfare

State Plumbing Code[283]

Department of Transportation
Outdoor Advertising Act[284]
Municipalities
Control of Nuisances[285]
Control of Junk Yards[286]
Other appropriate municipal ordinances.

LAWS RELATING TO RESTRICTIONS ON PROPERTY

Conservation Easements that may be held by any public body that is authorized to hold property interests.[287]
Restrictions under Wetlands Protection Act.[288]

LAWS RELATING TO TAXATION AT CURRENT USE RATHER THAN HIGHEST AND BEST USE

Farm and Open Space Land Law[289]
Tree Growth Tax Law[290]

LAWS RELATING TO WATER QUALITY

The principal provisions of Maine laws governing the protection and maintenance of water quality are administered by the Department of Environmental Protection.[291] In Maine, as elsewhere, the genus of all environmental legislation originated with water quality controls.[292] Perhaps this was because of the close connection between water quality and health and welfare which made such restrictions more publicly acceptable and constitutionally sustainable. At one time in Maine, the only restraints imposed on land development in many municipalities that did not have zoning were those instituted because such development threatened water quality. Water quality is still an important consideration; most of the recent environmental legislation includes prevention of water pollution or the enhancement of water quality as a criterion for approval or denial of a given activity.[293] The Federal Coastal Management Act and the Maine Shoreline Zoning Act are both predicated on protecting water quality. Without depreciating this tie in, it is submitted that coastal management legislation, if it is to be effective in saving the Maine coast, cannot be completely tied to the effects of land activity on water quality. For example, consider the sewer, septic tank,[294] scenery syndrome. Present provisions in the Plumbing Code,[295] minimum lot sizes and frontages requirements[296] and set backs for developments that dispose of their waste by surface disposal[297] are based on such considerations as soil conditions, slopes and land capability to absorb the anticipated sewage without detriment to the adjacent water body. The practical result is an intensity of development that is aesthetically pleasing from the water as well as preserving a certain amount of land in a natural condition. The construction of a sewer or advances in technology, however, may reasonably be anticipated. The above-mentioned restrictions on development would then be obsolete with respect to restricting development because of land and water capabilities. But leaving land in its natural state in restricting it to low density use might still be desirable. The Federal Coastal Zone Management Act is so phrased that all land use controls do not have to be tied in with water quality but may also be considered on their own merits.[298]

LAWS RELATING TO CONTROL OF LAND ABOVE NORMAL HIGH WATER MARK

Although some of the laws mentioned supra refer to management of land above high water mark, the principal Maine laws that regulate this area are listed below. Included in this category are the Site Selection Law, the Municipal Subdivision Law, and the Mandatory Shoreline Zoning and Subdivision Law which are discussed supra.[299]

Municipal Control

Maine has the typical provisions for zoning[300] including the requirement to have a comprehensive plan[301] and a Board of Zoning Appeal.[302] There are specific provisions for the responsibilities of Park and Conservation Commissions[303] and authority to enable municipalities to take land by purchase or eminent domain for park purposes, open space, to protect wetlands, or to keep areas in their natural state.[304]

The Municipal Subdivisions Law and the municipality's role in the Mandatory Shoreline Zoning Law are discussed, *supra.* [305]

State Level Control

(See Discussion of Wetlands Legislation, Site Location Law, and Mandatory Shoreline Zoning and Subdivision Law, *supra*, beginning at p. 39).

The Maine Land Use Regulation Commission.[306]

The Maine Land Use Regulation Commission (LURC) is responsible for planning for and zoning the unorganized territories for multiple use in accordance with sound land use planning and the capability of the natural resource base. The statutory framework provides for the classification and districting of lands, the preparation of land use guidance standards, and the adoption of those standards as minimum requirements for land use in the unorganized territories. Although there are many islands that are unorganized, there is little coastal land[307] on the mainland that belongs to this category.

FOOTNOTES

234. Genesis 1:9-10.

235. See II *Maine Law Affecting Marine Resources*, p. 187.

236. See footnote 83.

237. II *Maine Law Affecting Marine Resources*, p. 188.

238. See *Barrows* v. *McDermott* 73 Me. 441 (1882).

239. 12 M.R.S.A. 4304 is one example of legislative modification. This Section authorizes municipalities to grant exclusive rights on flats for the cultivation of clams, quahogs or mussels which is in derogation of the public right of free fishing. It should be noted that the adjacent riparian owner has preference to lease such flats but no absolute right. (See *Rogers* v. *Brown*, 135 Me. 117, 118, 190 A. 632 (1937). The result may be that the riparian owner is precluded from harvesting shellfish from his own flats. This case, it is submitted, has established a strong precedent to allow prohibition of other activity by the riparian owner on his own flats.

240. See *Andrew* v. *King* 124 Me. 361, 192 A. 298 (1925).

241. The best known portion of this act is the recently revitalized 1899 Refuse Act. 30 Stat. 1152, 33 U.S.C.A. 407.

242. 12 M.R.S.A. 4701-4711

243. *Babson* v. *Tainter* 79 Me. 368, 10 A. 63 (1887).

244. Id. at p. 374; *Henshaw* v. *Hungting* 67 Mass. (1 Gray) 203 (1859).

245. *Commonwealth* v. *Alger* 61 Mass. (7 Cush.) 53, 95 (1851); *State* v. *Wilson* 42 Me. 2 (1856); II *Maine Law Affecting Marine Resources* p. 272 et seq.

246. Adjudications in Vermont, Oregon, and Washington have reflected this point of view.

247. 12 M.R.S.A. 4701-4711.

248. 12 M.R.S.A. 4751-4758.

249. 12 M.R.S.A. 4757.

250. 12 M.R.S.A. 4252.

251. 12 M.R.S.A. 3701-3705 as amended by P.L., 1973, c. 432; 12 M.R.S.A. 3721-3731 as added by P.L., 1973, c. 462.

252. 12 M.R.S.A. 4304-5

253. 12 M.R.S.A. 4811. It should be noted that in the emergency preamble enacting the amendments to this law there is the language "...the Legislature has determined that it is in the public interest to encourage municipalities to zone land areas within 250 feet of a body of water".. (P.L., 1973, c. 564.) In view of the legal efficacy of emergency legislation (See footnote 17) a good argument could be made that on nontidal water bodies only land areas were to be zoned. This clause may still leave legislative intent on the intertidal zone unclear.

254. Coastal Zone Management Act of 1973, Sec. 304 (a) (b).

255. 38 M.R.S.A. 1-6.

256. 38 M.R.S.A. 82-84.

257. 38 M.R.S.A. 1021-1026.

258. 12 M.R.S.A. 4701-4711.

259. Title 12, Chapters 401-417 as amended by P.L., 1973, c. 513.

260. See P. & S. L. 1929, c. 114 as amended. The most recent major amendment was in the incorporation of this Authority into the Department of Transportation (P.L., 1971, c. 593).

261. 38 M.R.S.A. 321-329 as amended.

262. 12 M.R.S.A. 631-633.

263. 10 M.R.S.A. 2101-2111 as amended.

264. 10 M.R.S.A. 2151-2166.

265. 33 M.R.S.A. 1201-1217 as added by P.L., 1973, c. 616.

266. 38 M.R.S.A. 201-241.

267. 22 M.R.S.A.

268. 38 M.R.S.A. 361-372, 411-421, 451-454.

269. 38 M.R.S.A. 413 as amended by P.L., 1973, c. 139.

270. 38 M.R.S.A. 541-557.

271. 38 M.R.S.A. 481-488, 38 M.R.S.A. 481 as amended by P.L., 1971, c. 613.

272. 38 M.R.S.A. 422 as amended.

273. 38 M.R.S.A. 380-385 as enacted by P.L., 1973, c. 608.

274. 38 M.R.S.A. 382(3) as enacted by P.L., 1973, c. 608.

275. 12 M.R.S.A. 2205 as amended.

276. See footnote 268.

277. 38 M.R.S.A. 460-463 as amended.

278. 17 M.R.S.A. 2253

279. 38 M.R.S.A. 1061-1209.

280. 38 M.R.S.A. 1301-1308 as enacted by P.L., 1973, c. 387.

281. 10 M.R.S.A. 2210-2216.

282. 22 M.R.S.A. 1451-1456.

283. 32 M.R.S.A. 3351-3353.

284. 32 M.R.S.A. 2711-2723.

285. 17 M.R.S.A. 2701.

286. 30 M.R.S.A. 2451-2460.

287. 33 M.R.S.A. 667-668.

288. 12 M.R.S.A. 4754.

289. 36 M.R.S.A. 585-593.

290. 36 M.R.S.A. 585-593.

291. 38 M.R.S.A. 364 as amended. See also footnote 268.

292. See III *Maine Law Affecting Marine Resources*, p. 424 et seq. for historical review of statutes regulating water pollution.

293. See cataloguing of environmental criteria in environmental-coastal management laws contained in Working Paper, Proposed Guidelines for Mandatory Shoreline Zoning and Subdivision Controls. See footnote 48.

294. The basic weakness of the sewer, septic tank, scenery syndrome is further emphasized by coastal wetlands. Such wetlands should not be disturbed to install sewers, and even if there were sewers available to dispose of waste, wetlands should not be the site of intensive development both for biological and ecological considerations.

295. 32 M.R.S.A. 3351-3353 and regulations promulgated under this authorization.

296. State requirements are contained in 12 M.R.S.A. 4807 as repealed and reenacted by P.L., 1973, c. 411. A municipality may adopt more stringent regulations.

297. Required by State Plumbing Code (See footnote 164) and applicable municipal ordinances.

298. For example: See Federal Coastal Zone Management Act of 1972, Sec. 306(c)(8)(9).

299. See page 33 et seq.

300. See Title 30 of the Maine Revised Statutes.

301. 30 M.R.S.A. 4961 as amended.

302. 30 M.R.S.A. 2411 as amended.

303. 30 M.R.S.A. 3851 as amended.

304. 30 M.R.S.A. 4001 as amended.

305. See p. 36

306. 12 M.R.S.A. 681-689 as amended.

307. The main land townships of Prescott and Edmunds are unorganized and thus under LURC jurisdiction.