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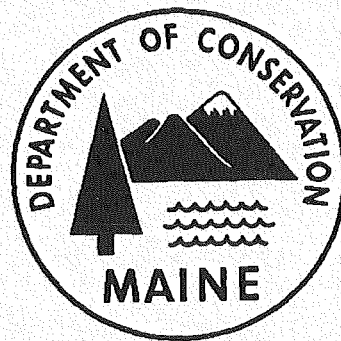
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REPORT TO THE
AGRICULTURE, CONSERVATION AND
FORESTRY COMMITTEE ON:

The Leasing of Submerged Lands



Prepared by:

DEPARTMENT OF CONSERVATION
Bureau of Parks and Lands

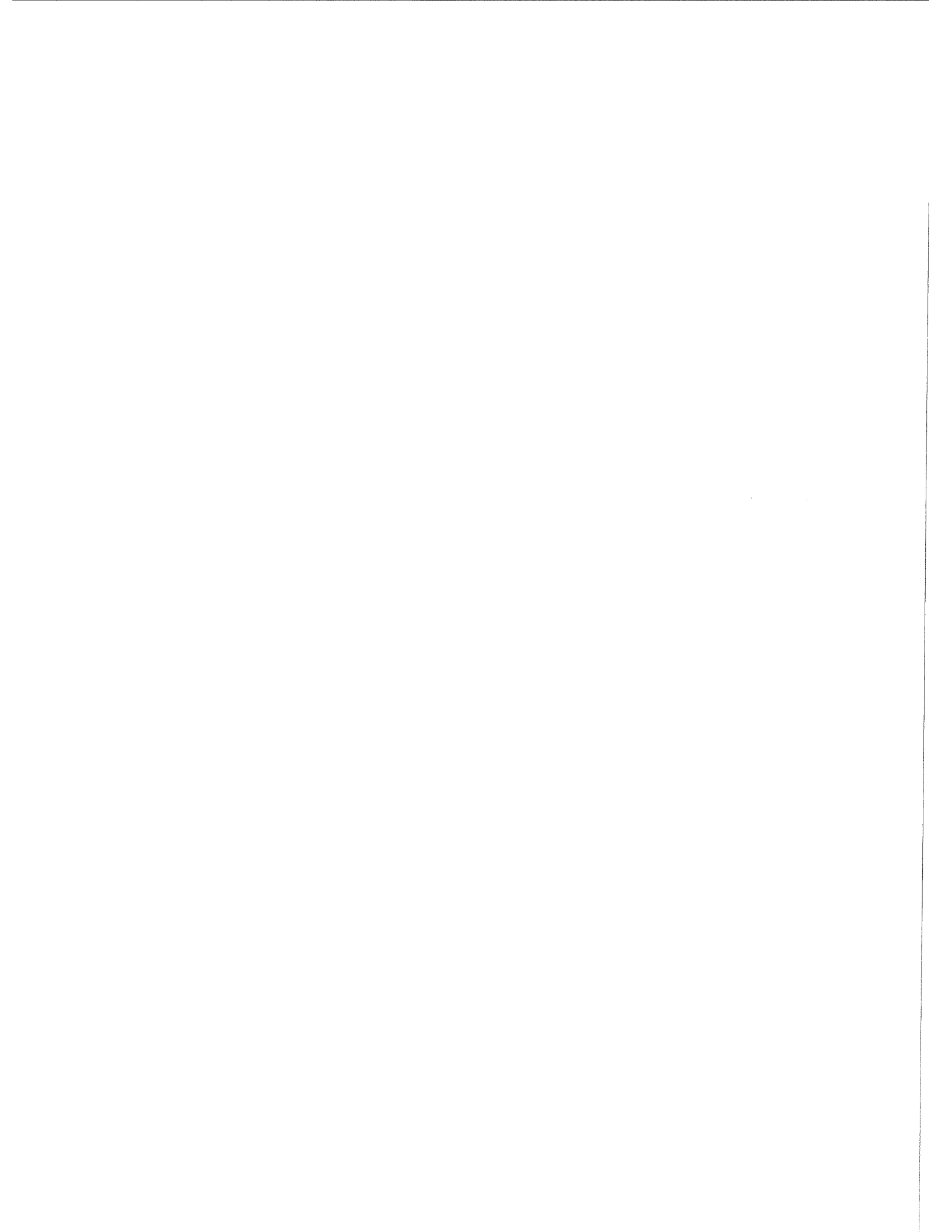
January 2, 1996

REPORT OF THE SUBMERGED LANDS TASK FORCE

January 1996

Table of Contents

<u>I. SUMMARY</u>	2
<u>II. TASK FORCE MEMBERS</u>	3
<u>III. PURPOSE OF STUDY</u>	4
<u>IV. LD 1404</u>	4
<u>V. TASK FORCE ACTIVITIES</u>	4
<u>VI. RECOMMENDATIONS, IMPLEMENTATION & DISCUSSION</u>	4
A. USE CATEGORIES	5
B. FEE SYSTEM	6
C. SUBMERGED LAND LEASE	7
D. APPLICATION PROCESS	8
E. SUBMERGED LANDS BOARD	8
F. SUBMERGED LANDS PROGRAM	9
<u>VII. CONCLUSION</u>	10
 <u>EXHIBITS</u>	
A. History & functions of program	11
B. Letter from Agriculture, Conservation and Forestry Committee	14
C. LD 1404	15
D. Draft of proposed legislation to amend submerged lands law	24
E. Excerpt from a letter from the Maine Marine Trade Association	26



REPORT OF THE SUBMERGED LANDS TASK FORCE

January 1996

I. SUMMARY

The Maine Legislature's Joint Standing Committee on Agriculture, Conservation and Forestry directed the Department of Conservation to meet with interested parties and resolve the issues raised during the public hearing on LD 1404, An Act to Amend the law regarding the Lease of Submerged Lands.

The Agriculture, Conservation and Forestry Committee outlined the issues to be addressed and requested a report with recommendations by January 15, 1996. To meet this request, Department of Conservation Commissioner Ronald Lovaglio assembled a task force. Task force members represented submerged land lease holders, including marinas and other water dependent business, commercial fishing, upland uses, the Department of Marine Resources, recreational boating interests, and the general public. Commissioner Lovaglio appointed Thomas Morrison, Director of the Bureau of Public Lands, to chair the task force. The bureau provided staff support.

The task force makes the following recommendations:

1. Reduce the submerged land rental fee for upland uses to make it the same as water dependent uses. Leave other use categories unchanged.
2. Modify the current submerged land rental fee structure by placing a maximum cap of \$1200 on all rents and by raising minimum rental fees to \$100 per year and easement registration fees to \$50 every 5 years.
3. Modify the standard submerged land lease to make it transferable, renewable, and more stable.
4. Identify opportunities to improve the application process and implement appropriate action.
5. Establish a submerged lands board.
6. Maintain the existing program functions.
7. Extend the completion date for the coastal structure inventory from 12/31/95 to 12/31/96.

These recommendations are discussed in more detail in the body of this report.

Information about the history and functions of the submerged lands program is attached as Exhibit A. An additional perspective prepared by the Maine Marine Trades Association is attached as Exhibit E.

II. TASK FORCE MEMBERS

Ralph Stevens
c/o Yankee Marina & Boat Yard Inc.
PO Box 548
Yarmouth, ME 04096

Susan Swanton
Chase Leavitt & Company
PO Box 589
Ten Dana Street
Portland, ME 04112

Penn Estabrook
Department of Marine Resources
21 State House Station
Augusta, ME 04333-0021

George Smith
Executive Director
Sportsman's Alliance of ME
RR 1 Box 3130
Mt. Vernon, ME 04352

Jay Lawrie
Bar Harbor Inn
Newport Drive
Bar Harbor, ME 04609

David Getchell
Maine Island Trail Association
RR1 Box 3355
Appleton, ME 04862

Ellsworth Lawrence
Maine Harbor Master's Association
Rt2 Box 2038
Gardiner, ME 04345

William Giroux
Waterfront Manager
Marine Trade Center
Suite 307
Portland, ME 04101

Peter McAleney
New Meadows Lobster Co.
Pier End Associates
53/54 Portland Pier
Portland, ME 04101

Tom Morrision
Director
Bureau of Parks & Lands
22 State House Station
Augusta, Me 04333

III. PURPOSE OF THE STUDY

The Agriculture, Conservation and Forestry Committee requested that the task force examine the following issues:

1. differentiation of use categories;
2. a more equitable fee structure;
3. stability of submerged land leases;
4. ways to improve the application process;
5. the bureau's ability to manage the submerged lands program.

A copy of the letter from the Agriculture, Conservation and Forestry Committee to Commissioner Lovaglio is attached as Exhibit B.

IV. LD 1404

The Agriculture, Conservation and Forestry Committee held a public hearing on LD 1404, An Act to Amend the law regarding the Lease of Submerged Lands, on May 16, 1995. If enacted as drafted, the LD would have granted public trust status to private structures and significantly reduced the revenue to the state from submerged land rentals. At a subsequent work session, the committee directed that the bill be held over until the 1996 Legislative Session and directed the Department of Conservation to assemble a task force, study the issues raised by the LD, and prepare this report with recommendations for amending the LD. A copy of the LD is attached as Exhibit C.

V. SUMMARY OF TASK FORCE ACTIVITIES

The task force met six times between August 1, 1995 and December 12, 1995. Initial meetings focused on identifying issues that concerned task force members and providing information about the program and the issues to the task force members.

VI. RECOMMENDATIONS, IMPLEMENTATION AND DISCUSSION

The findings of the task force are summarized here as recommendations. Many of these recommendations will require amending the submerged land law. A proposed LD to implement these amendments is attached as Exhibit D.

A. USE CATEGORIES

1. Recommendations

The task force agreed to the following categories:

- a. Public Use
- b. Commercial Fishing
- c. Slip Space
- d. Pipelines & Cables
- e. Dredging
- f. All Other Uses

2. Implementation

The submerged lands law will have to be amended to make rental fees for upland uses the same as those for water dependent uses.

3. Discussion

This proposal combines upland uses and water dependent uses into one category. All piers, wharves, floats, ramps, restaurants, hotels, parking lots, and other structures for private or commercial use (except commercial fishing) would fall into the same category for leasing purposes.

There was some concern about whether or not commercial fishing should continue to be charged less than other uses. Some members felt that it should continue to receive special recognition in light of its unique historical and traditional status. Others felt that no special interest group should be singled out and that other business and recreational uses deserved equal status.

There was also discussion about whether or not upland uses should continue to pay more than water dependent uses. Most upland uses were put into place before the rental fee structure came into effect. It was agreed that upland uses should be grandfathered and pay the same rent as water dependent uses. The task force felt that, due to shoreland zoning, it was unlikely that any new upland uses would be permitted. However, the Bureau does continue to receive applications for upland uses. Under this recommendation, new upland uses will be treated the same as water-dependent uses.

There was some discussion about whether or not dredging should require a fee, but for now, no change was recommended. There was also some support for increasing the rental rate for pipelines & cables, but no agreement was reached to support that change. These are issues that could be further explored by a submerged lands board.

B. FEE STRUCTURE

1. Recommendations

- a. Keep the existing structure in place and institute a maximum annual rental fee cap of \$1200 regardless of size of structure or type of use.
- b. Raise the minimum annual rental fee from \$75 to \$100.
- c. Raise the registration fee for all easements and constructive easements from \$25 every 5 years to \$50 every 5 years.
- d. Make the Submerged Lands Account an interest bearing account.

2. Implementation

The submerged land law will have to be further amended to include all of the specific changes listed above. If enacted, they would all go into effect in 1997.

3. Discussion

Most of the task force's time was spent analyzing and discussing the fee structure. The proposal herein does not satisfy the concerns of those who objected to basing the fee structure on adjacent upland values and allowing regional variation in rental fees. The task force also examined a flat square-foot fee structure and decided it was not a good alternative. The proposed recommendations do result in lower fees and addresses the most critical issues. A fee structure that addresses other issues will be needed in the year 2005 when the constructive easement period ends.

As long as some structures remain under constructive easement and are not subject to a rental fee, there is a built in inequity in the fee structure. In 1995, holders of a constructive easement paid no fee while others, who may compete in the same market as the constructive easement holder paid a rental fee. Among those who have leases and paid rent in 1995, the fees varied from \$75 (the legal minimum) to \$14,041. For 191 lessees in 1995, the breakdown was:

- \$100 or less: 93
- \$100 - \$1000: 67
- \$1000 - \$4000: 24
- \$4000 or more: 7

With the proposed changes, the gap between those at the extreme ends of the lease fee scale will decrease from the present range of \$75 - \$14,000 per year to \$100 - \$1,200 per year.

Registration fees for constructive easement will increase from \$0 per year to \$10 per year.

The proposal is based on estimates of the number of constructive easement holders and assumes that they will willingly participate in the program. If the estimates and assumptions are accurate, the resulting revenue will be very close to the minimum required to run the program. Until the number of lessees increases significantly, there will probably be little or no money available for the Shore & Harbor Management Fund, abandoned vessel removal, or outside contracting to help complete the coastal structure inventory more quickly than the current projected completion date of December 31, 1996.

C. SUBMERGED LANDS LEASE

1. Recommendations

- a. Make the lease more easily transferable by adding to Section 5 of the standard lease:
"Such consent not to be unreasonably withheld under then applicable laws, regulations, and public trust principles."
- b. Improve the stability of the lease by removing the part of Section 19 that states "This Lease is subject to change or cancellation, in whole or in part, by reason of any Act of the Legislature"
- c. Further improve the stability of the lease by amending the remaining part of Section 19 as follows:
"and This lease is subject in whole or in part to the provisions of issued in accordance with the Rules of the Bureau of Parks & Lands: in effect on the effective date of this lease."
- d. Make the lease renewable at any time, subject to applicable laws, regulations, and public trust principles at the time of renewal, if the lessee is in compliance with all terms of the lease.

2. Implementation

The Bureau can put recommendations a, b and c into effect for all new leases by amending the standard lease form. The Agriculture, Conservation and Forestry Committee asked to be notified about recommendation b. None of these changes will be made until approved by the Legislature. Recommendation d requires amending current submerged lands law to include a renewal clause.

3. Discussion

The task force agreed to recommend changes in the lease that would make leases more financeable. Some members of the task force would prefer to see the changes enacted into law as well. According to a representative of the Maine Banker's Association, the biggest concern is stability. Lessees and lenders want to limit disruptive changes in the lease's terms and rental fees. The current lease states that the Legislature may change the terms of a lease. Removing the offending clause will satisfy the lending community. The Legislature may still have the power to legislate changes in the terms of an existing lease or to terminate a lease prior to its expiration, even without a clause to that effect, but removing the clause makes it less likely to occur.

Some Task Force members were also concerned about renewability. The Department of the Attorney General advised against a 99-year lease or guaranteed renewability, citing the state's fiduciary responsibility as trustee to reexamine the use of trust lands periodically. Commercial lessees and the banking community would prefer longer terms or guaranteed renewability to cover the term of their investment and to protect their ability to sell the business in the future. The proposal assures renewal in all but exceptional circumstances and reflects current practice.

D. APPLICATION PROCESS

1. Recommendations

The Bureau of Parks & Lands will continue to work on improving the application process.

2. Implementation

The Bureau will work with other agencies, the Legislature and interested persons to improve the process.

3. Discussion

This topic was the last to be addressed by the task force and discussion was limited. Several members stated that the application process has worked better in the past year. Suggestions for items to examine to improve the process were:

- a. Create a uniform fact sheet for all applicants to be used by all agencies.
- b. Reduce the 30 day public review period.
- c. Determine if there are some reviews now done by BPL that DEP can do.
- d. Develop a common application form for use by all agencies.
- e. Train local Code Enforcement Officers so that they know which agencies applicants will have to deal with.

E. SUBMERGED LANDS BOARD

1. Recommendation

A submerged lands board should be established to complete the tasks recommended in this report.

2. Implementation

The task force did not reach agreement on whether the board should be created legislatively or by some other method.

3. Discussion

The Agriculture, Conservation and Forestry Committee did not charge the task force to examine the establishment of a board. However, because there are unresolved issues and a need for additional guidance to the submerged lands program, the task force spent parts of several meetings discussing the topic.

The task force agreed that some type of board should continue the work begun by the task force. However, there was no consensus about how the board would be established, what its powers and duties would be, the terms and method of appointment, which groups should be represented, and whether the board would be advisory or have decision making authority. Some suggestions were that the board would:

- continue the work of the task force to improve the application process and develop a new fee structure for implementation in or before 2005.
- provide guidance to the Bureau, help set policy on submerged lands and deal consistently with problems when they arise.
- determine an appeals process to review grievances between applicants and listen to appeals of

- bureau decisions.
- provide information to the Legislature and continuity to the program.
 - involve other interested and knowledgeable stakeholders.

Suggestions for representation on the board were:

- submerged land lessees
- general public
- anglers, hunters and recreational boaters
- municipal
- public trust expertise
- commercial fishing
- interested parties, such as MMTA.

F. SUBMERGED LANDS PROGRAM

1. Recommendation

- a. Maintain the existing program functions.
- b. Extend the completion date for the inventory of structures grant constructive easements.

2. Implementation

The submerged land law will have to be further amended to reflect the new completion date for the structure inventory.

3. Discussion

The task force examined the possibility of reducing program staff. Currently there are two full time positions that conduct the daily work of the program and part of one supervisory position that is funded for 15 hours per week to oversee the program. Opinions about the desirable size of the program varied. Some felt that the program did not provide enough public benefits and should be increased to a level that would provide more public benefits, others felt that the program could be eliminated. After examining the functions of the program, the current workload, and the projected future workload, the task force agreed that the program should continue to be staffed at the current level.

A key element of the program is the Shore & Harbor Management Fund. This fund is supposed to provide grants to municipalities for funding public access and similar projects, to compensate for decreased public access to submerged lands that are occupied by private structures. The fund receives any submerged land revenues that are in excess of the costs to run the program. Currently the fund has \$15,000 and is expected to continue to grow very slowly under the proposed new fee structure.

Another major component of the program is an inventory of all structures granted constructive easements. The submerged land law directs the Bureau to complete the inventory by December 31, 1995. The information from the survey will be critical for implementing the proposed new fee structure. The Bureau has not had sufficient staff or funds to complete the inventory within the required time. The Bureau has prepared a schedule for completing the inventory of coastal structures by December 31, 1996 and requests that the submerged land law be amended to show the revised completion date.

IX. CONCLUSION

The submerged lands task force has examined the issues as directed by the Agriculture, Conservation and Forestry Committee, identified additional concerns, and reached consensus on actions that will alleviate the most pressing concerns. Task force members represented a wide range of interests, which resulted in varying opinions, concerns and levels of knowledge about the program and its associated issues. Much of the task force's time has been spent discussing the program and understanding the different concerns of its members. The proposed recommendations are hereby respectfully submitted for consideration by the Agriculture, Conservation and Forestry Committee.

Exhibit A. History & functions of program

This summary was prepared by the Bureau of Parks & Lands and provided to the task force.

A. HISTORY

Submerged lands are a public trust resource owned collectively by all the people of Maine. Under the public trust doctrine, the lands are held by the state in trust for the benefit of all. Through the submerged land law, which was enacted in 1975, the Legislature designated the Bureau of Public Lands as the agency responsible for managing submerged lands in accordance with public trust doctrine.

The doctrine of public trust recognizes that the public has fundamental rights to use submerged lands. These include the rights to fish, hunt, navigate, swim, and otherwise enjoy customary and traditional uses of the submerged lands and the waters over them. Under Maine law, any use that is not open to all on an equal basis, or that requires that an area be occupied in other than a transitory fashion, or excludes some members of the public from freely exercising their rights, requires a special conveyance from the state. This is true even when a private use provides other benefits.

Some uses of submerged lands are more compatible with public trust rights than others. However, any occupation of submerged lands by a structure affects the public's ability to freely exercise at least some of their public trust rights. For example, navigation through the occupied area may be impeded. Fishing, hunting, swimming, or other public uses may also be excluded. Piers, wharves, marinas, and other water dependent structures facilitate public trust uses but are not public trust uses in and of themselves. The common law riparian right of a shorefront property owner to construct a wharf is subordinate to the public trust rights and is regulated by the state. Maine's submerged lands program strives to strike a balance between private and public uses of submerged lands by managing exclusive uses to minimize their impact on public trust rights.

B. FUNCTIONS OF THE SUBMERGED LANDS PROGRAM

1. Stewardship of a public resource

The state has a legal obligation to provide stewardship of submerged lands. Under 12 MRSA § 551, the Bureau of Public Lands is obliged to manage submerged lands according to the principles of multiple use and sustained yield of products and services. Funding for the program has limited stewardship activities to conducting public reviews and minimizing the impact of proposed structures and activities on public trust. The Bureau's goal has been to gradually build the financial health of the program so that the state can eventually provide compensation to the public for the loss of trust rights that result from the private use of submerged lands.

2. Legal conveyance of right, title and interest.

To get a permit from a regulatory agency, an applicant must hold sufficient right, title and interest in the land that will be occupied by the project. The Submerged Lands Act empowers the Bureau of Public Lands, on behalf of the State, to convey limited right title and interest to private individuals through a renewable thirty-year easement or lease. Without this conveyance,

wharves, piers, and other structures could not legally occupy publicly owned submerged lands because the owner of the structure would not have sufficient right, title and interest.

3. Public review of effects of structures & uses on public trust.

The Bureau of Public Lands reviews all applications for new structures or for significant changes or expansions of existing structures for their impact upon public trust rights. This is a public process in which any interested party may participate. As a result of this review, the Bureau may require modifications of the structure or place conditions upon the lease or easement. Neither the Maine DEP nor the US Army COE reviews all the projects that are reviewed by the Bureau.

a. Public Trust Review Topics.

i. Public access ways to submerged lands.

The Bureau seeks to assure that traditional public access ways to and from submerged lands are not obstructed or diminished. If traditional access is blocked, the Bureau seeks to establish new access in compensation.

ii. Fishing

The Bureau considers only the public's opportunity to fish, not the biological impacts on the fish themselves. Protection of fishery resources is the responsibility of the Department of Marine Resources or Inland fisheries & Wildlife. Impacts of development on biological resources is regulated by the Department of Environmental Protection.

iii. Waterfowl hunting

As with fishing, the review focuses on protecting the opportunity to hunt, not the resource.

iv. Navigation

Navigation is reviewed because it is one of the fundamental public trust rights (along with fishing and fowling) defined by the Colonial Ordinances of 1641. It includes the right to navigate across and anchor in all open water, not just specific channels and anchorages.

v. Existing marine uses of the area and availability of services and facilities necessary for commercial marine activities.

There are specific guidelines in the Submerged Lands Rules that are designed to protect existing marine businesses from being adversely affected by incompatible development.

These guidelines refer specifically to:

- loss of opportunity or displacement of commercial fishing vessels
- loss or reduction of access to fishing grounds
- loss or reduction of repair and maintenance services for commercial vessels
- loss of fish buying, processing or handling facilities or access to such facilities
- increased risk of damage to life or property

The ability of Maine people to make a living on the waters of the state is a primary concern of the Submerged Lands Program, and commercial activities are therefore generally favored over recreational in cases of conflict.

vi. Ingress and egress of riparian owners.

The Bureau seeks to avoid any loss to riparian owners of the right of direct access to the adjacent waters. This ensures that abutting owners will not lose their ability to wharf out or access navigational channels.

b. Public Trust Review Process.

The Bureau sends location maps, site plans and letters requesting written comments to:

- town office for comments from town officials and for public posting
- town harbormaster
- shoreline abutters
- nearby marine related businesses
- Department of Marine Resources (on coastal waters)
- Department of Inland Fisheries and Wildlife (on freshwater)
- other interested parties (*e.g.*, the Casco Bay Estuary Project, lake associations)

Neither the DEP nor the COE conduct a public review under the DEP Permit by Rule or the COE's Category I or Category II of the Programmatic General Permit. Projects that fall into these categories account for about two-thirds of the public reviews conducted by BPL (in 1995, 21 of 34 to date). When a project is of sufficient magnitude, some of the issues are reviewed by the DEP under the Natural Resources Protection Act or by the COE under the Individual Permit application. When there is joint review of a specific issue, the three agencies coordinate the review process, thus assuring that the same information is available to all and the same factors are considered in each agency's findings. Each agency reviews issues from a different perspective. The DEP has primary responsibility for minimizing environmental impacts. The COE has primary responsibility for protecting national interests, especially federally established navigation channels and anchorages. The BPL has primary responsibility for protecting public trust, existing businesses and infrastructure, and customary and traditional uses.

4. Conflict Resolution

The Bureau recognizes a "littoral zone," a defined area of submerged lands adjacent to an upland parcel. Within the littoral zone, submerged lands conveyances may be granted only if the applicant holds right, title, or interest to an adjacent upland parcel. When littoral zones overlap, or when a structure intrudes into an abutter's littoral zone, the Bureau works with the applicant and the abutters to develop a mutually agreeable solution. When a proposed structure diminishes or precludes a public trust use, the Bureau works with the applicant to develop conditions that minimize the impact.

5. Encourage access for the general public and commercial fishing

The submerged lands law requires no rental fees for projects, or portions of projects, that allow free public access. The law requires rental fees that are one-half of the water dependent use rate for projects, or portions of projects, that facilitate commercial fishing. In doing so, the current fee structure provides an incentive for developers to consider including public or commercial fishing access in new developments.

6. Abandoned vessel removal

The submerged lands law provides for removal of abandoned watercraft. The Bureau shares the cost of removal, based on available funds, and obtains the necessary permits for disposal.

7. Shore & Harbor Management Fund Grants

This program is intended to provide funds to municipalities for harbor planning, public access and similar projects. Funds have not yet been sufficient to begin the grant program and the Bureau has not yet promulgated rules for disbursing the funds.

8. Coastal Structure Inventory

The Submerged Lands Law requires the Bureau to inventory structures that have been granted constructive easements. The purpose is to identify owners of structures that may require a conveyance from the state when the constructive easement period ends in 2005. The results of the project are being entered into the state Geographic Information System and will provide other benefits as well, including quick identification of structures and owners in the event of an emergency such as severe weather or an oil spill.

9. Public Information & Assistance

The Bureau gets many requests for information. These include questions about public trust and individual rights under the public trust doctrine, harbor management issues related to submerged lands and access, placement or removal of moorings, ownership of flowed land adjacent to great ponds, and similar topics.

Exhibit B. Letter from Agriculture, Conservation and Forestry Committee

SENATE

VINTON E. CASSIDY, DISTRICT 4, CHAIR
WILLIS A. LORD, DISTRICT 34
JUDY A. PARADIS, DISTRICT 1

JOHN KELLEY, LEGISLATIVE ANALYST
JEAN DAVENPORT, COMMITTEE CLERK



STATE OF MAINE

ONE HUNDRED AND SEVENTEENTH LEGISLATURE

COMMITTEE ON AGRICULTURE, CONSERVATION AND FORESTRY

HOUSE

MARJORIE L. KILKELLY, WISCASSET, CHAIR
CONRAD HEESCHEN, WILTON
DOUGLAS J. AHEARNE, MADAWASKA
CLYDE A. HICHBORN, LAGRANGE
THOMAS M. TYLER, WINDHAM
ROBERT W. SPEAR, NOBLEBORO
DONALD A. STROUT, CORINTH
RUEL P. CROSS, DOVER-FOXCROFT
RICHARD KNEELAND, EASTON
EDWARD L. DEXTER, KINGFIELD

May 26, 1995

TO: Ronald B. Lovaglio, Commissioner
Department of Conservation

FROM: Vinton E. Cassidy, Senate Chair
Marjorie L. Kilkelly, House Chair
Joint Standing Committee on Agriculture, Conservation and Forestry

RE: LD 1404 - An Act to Amend the Law Regarding the Lease of Submerged Lands

The Legislative Council has approved the unanimous request by the Joint Standing Committee on Agriculture, Conservation and Forestry to carry over LD 1404, An Act to Amend the Law Regarding the Lease of Submerged Lands.

The committee voted with the understanding that representatives of the Bureau of Public Lands will meet with a variety of interested parties and work to resolve some of the issues raised during the bill's public hearing and worksession. We would appreciate a report on your findings and any actions by January 15, 1996. By carrying over LD 1404, the committee retains a vehicle with which to put forth any necessary legislation.

The committee requests the bureau to examine and, if possible, implement ways in which current leasing can be changed to provide greater stability to leaseholders and to those who finance operations that occur on leases. However, in the event any proposed changes limit future legislative authority, we would appreciate the opportunity during the Second Regular Session to review the proposal.

In addition, the committee would like the bureau to examine the basis of the current statutory fee structure, with particular attention paid to equity. Which is more equitable: The current structure and its tie to municipally assessed uplands, or a statewide flat square-foot fee? What are the pros and cons of each approach? How does each relate to the bureau's ability to manage the submerged lands leasing program?

The committee would also appreciate an examination of the differentiation of uses and fees in current law. Is the rationale for this segmenting still valid? Does another approach have merit?

Finally, the committee would like the bureau to examine ways of streamlining the leasing process.

It is the committee's understanding that the bureau will convene meetings with interested parties to review these issues. We would like to suggest these meetings include representatives of leaseholders, including marinas, commercial fishing operations and upland uses, the Department of Marine Resources, recreational boating interests and the general public. We would also appreciate you notifying members of this committee and the Joint Standing Committee on Marine Resources of the dates, times and places of meetings.

We greatly appreciate your work on these questions and look forward to your report to the committee.

7202Nrg



117th MAINE LEGISLATURE

FIRST REGULAR SESSION-1995

Legislative Document

No. 1404

H.P. 993

House of Representatives, April 21, 1995

An Act to Amend the Law Regarding the Lease of Submerged Lands.

Received by the Clerk of the House on April 19, 1995. Referred to the Committee on Agriculture, Conservation and Forestry and ordered printed pursuant to Joint Rule 14.

A handwritten signature in cursive script that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative KILKELLY of Wiscasset.
Cosponsored by Representative GOULD of Greenville and
Representatives: CHARTRAND of Rockland, DEXTER of Kingfield, DiPIETRO of South
Portland, GATES of Rockport, HARTNETT of Freeport, HEINO of Boothbay, JOYCE of
Biddeford, KERR of Old Orchard Beach, KONTOS of Windham, LEMONT of Kittery,
MARSHALL of Eliot, MITCHELL of Vassalboro, OTT of York, PEAVEY of Woolwich,
REED of Falmouth, RICE of South Bristol, SIMONEAU of Thomaston, SPEAR of
Nobleboro, TYLER of Windham, WINGLASS of Auburn, Senators: BUTLAND of
Cumberland, GOLDTHWAIT of Hancock, PINGREE of Knox, SMALL of Sagadahoc.

Be it enacted by the People of the State of Maine as follows:

2
3 Sec. 1. 5 MRSA §12004-D, sub-§5 is enacted to read:

4 5. Submerged Lands Expenses 12 MRSA §558-D
5 Public Trust Review Board Only

6
7 Sec. 2. 12 MRSA §558-A, as corrected by RR 1991, c. 2, §36,
8 is repealed.

9
10 Sec. 3. 12 MRSA §558-B, sub-§3, as enacted by PL 1991, c. 427,
11 §4, is amended to read:

12
13 3. **Revenues.** Annual revenues in excess of the operating
14 expenses of the submerged lands leasing program described in
15 section 558-A 558-C and the expenses of the abandoned watercraft
16 program described in chapter 202-C must be deposited in the fund.

17
18 Sec. 4. 12 MRSA §§558-C and 558-D are enacted to read:

19 §558-C. Submerged and intertidal lands of the State

20
21 1. Definitions. As used in this chapter, unless the
22 context otherwise indicates, the following terms have the
23 following meanings.

24
25 A. "Fishing activity" means any activity involving the
26 landing or processing of shellfish, finfish or other living
27 resources of the sea or other activities, including fueling,
28 directly related to landing, processing, loading or selling
29 of shellfish, finfish or other living resources of the sea.

30
31 B. "Occupying" refers to the total area of the structure or
32 alteration itself to the extent that the area within its
33 boundaries is directly upon or over submerged lands.

34
35 C. "Permanent" means occupying submerged and intertidal
36 lands held in trust by the State during 7 or more months
37 during any one calendar year.

38
39 D. "Public trust uses" means uses of submerged or
40 intertidal lands of the State by public and private entities
41 that are reasonably calculated to directly facilitate
42 customary or traditional water-dependent uses, including but
43 not limited to navigation, fowling, fishing and other
44 activities by which those entities may use, enjoy and have
45 access to the public waters and submerged and intertidal
46 lands of the State.

47
48 E. "Submerged land" means:
49

2 (1) All land from the mean low-water mark or a maximum
4 of 1,650 feet seaward to the mean high-water mark,
6 whichever is closer to the mean high-water mark, out to
8 the seaward boundary of coastal waters as defined in
10 section 6001;

12 (2) All land below the mean low-water mark of tidal
14 rivers upstream to the farthest natural reaches of the
16 tides;

18 (3) All land below the natural mean low-water mark of
20 ponds that in their natural state are 10 or more acres
22 in size; and

24 (4) The river bed of international boundary rivers,
26 defined as all land lying between defined banks,
28 created by the action of surface water and
30 characterized by a lack of terrestrial vegetation and
32 devoid of topsoil, and the international boundary line.

34 F. "Upland uses" include those activities that do not
36 directly facilitate public trust uses and that ordinarily
38 and customarily occur at a location other than on submerged
40 lands.

42 2. Public trust use of submerged and intertidal lands.
44 Public or privately-owned entities that facilitate public trust
46 uses within the meaning of subsection 1, paragraph D are
48 conditionally permitted use of submerged and intertidal lands of
50 the State as long as their structures are not converted to or
 used primarily in support of upland uses. Those structures may
 include, but are not limited to, boat ramps, piers, docks,
 wharves, marinas, boatyards, boat clubs and other facilities
 located in, on or over submerged lands and reasonably calculated
 to directly facilitate public trust uses.

The Director of the Bureau of Public Lands shall establish a
 program for registration by the Bureau of Public Lands of those
 structures exempt from lease under this section as directly
 facilitating public trust uses. Those structures must be
 registered with the bureau, beginning on February 1, 1996. The
 director shall require a registration fee of \$100 and may require
 those structures to be reregistered periodically, but no more
 frequently than once every 5 years.

3. Leases. The director may lease for a term and upon such
 conditions as the director determines reasonable the right to
 dredge and fill, and to erect permanent causeways, bridges,
 pipelines, underwater cables or other permanent structures that
 do not facilitate public trust uses in, on or over submerged and
 intertidal land held in trust by the State, provided the director

2 determines that the lease will not unreasonably diminish,
3 encumber or interfere with the public access ways or public trust
4 rights in, on or over the intertidal or submerged lands and the
5 water above those lands.

6 A. For fill, permanent causeways, bridges, pipelines,
7 underwater cables or other permanent structures, the
8 director shall collect from the lessee reasonable public
9 compensation for those public trust rights diminished or
10 encumbered by the lessee's occupying the submerged or
11 intertidal land.

12 B. The director may also lease a buffer zone of not more
13 than 30 feet in width around a permanent structure located
14 on submerged or intertidal land, provided the lease is
15 necessary to preserve the integrity and safety of the
16 structure and the Commissioner of Marine Resources consents
17 to that lease.

18 C. The director may grant the proposed lease if the
19 director finds that the proposed lease:

20 (1) Will not unreasonably diminish, encumber or
21 interfere with the public trust rights of the people of
22 this State; and

23 (2) Will not unreasonably interfere with the riparian
24 rights of private property owners.

25 D. For dredging impounded areas and underwater cables and
26 pipelines, the director shall establish such additional
27 terms and conditions of lease as the director determines
28 reasonable.

29 E. The director shall require a one-time administrative fee
30 of \$100 for each lease in addition to any public
31 compensation required as a condition of that lease.

32 4. Constructive easements. Those permanent structures
33 actually upon submerged and intertidal lands on October 1, 1975
34 are deemed benefited by a constructive easement on that submerged
35 land directly underlying the structure until October 1, 2005.
36 Beginning on January 1, 1991, the bureau must undertake a
37 registration program for all structures benefited by constructive
38 easements. The bureau must complete the registration of
39 constructive easements on or before December 31, 1995.

40 5. Consultation. The director and the board may consult
41 with the Commissioner of Conservation, the Commissioner of Marine
42 Resources, the Commissioner of Inland Fisheries and Wildlife and
43 the Commissioner of Environmental Management.

2 other agencies or organizations determined appropriate for the
3 administration of this section.

4 6. Rules. The board in consultation with the director
5 shall adopt rules necessary and appropriate to administer this
6 section.

7 7. Dedication of public compensation. All fees and other
8 consideration received by the bureau as compensation to the
9 public for any diminution of its public trust rights collected
10 under this section accrue to the Submerged Lands Fund established
11 in section 557-A.

12 8. Aquaculture exemption. A lease for the use of submerged
13 lands under this section is not required for the development and
14 operation of any aquaculture facility if the owner or operator of
15 the facility has obtained a lease from the Commissioner of Marine
16 Resources under section 6072. Ancillary equipment and facilities
17 permanently occupying submerged lands on the lease site and not
18 explicitly included in the lease granted by the Commissioner of
19 Marine Resources are not exempt from the requirements of this
20 section.

21 **§558-D. Submerged Lands Public Trust Review Board**

22 1. Creation of review board. The Submerged Lands Public
23 Trust Review Board, as established by Title 5, section 12004-D,
24 subsection 5, is created within the Department of Conservation
25 for the purposes of deciding appeals from submerged lands
26 lease-related decisions of the Director of the Bureau of Public
27 Lands and adopting in consultation with the director rules
28 related to submerged lands. The Submerged Lands Public Trust
29 Review Board, in this chapter called the "board," consists of 7
30 public members. Members must be experienced, knowledgeable and
31 actively involved in an enterprise directly facilitating public
32 trust uses and are appointed as follows: Two by the President of
33 the Senate; 2 by the Speaker of the House of Representatives; and
34 3 by the Governor.

35 Members of the board serve 3-year terms. Of the initial
36 appointees, 2 must be appointed for a one-year term, 2 must be
37 appointed for a 2-year term and 3 must be appointed for a 3-year
38 term. Thereafter, appointees are appointed to serve 3-year
39 terms. A member may not be a state employee. Members hold
40 office until the appointment of their successors. A vacancy
41 during an unexpired term must be filled as provided in this
42 section, but only for the unexpired portion of the term. The
43 board shall elect a chair from among its members annually.

44 The director shall attend all meetings of the board and is
45 permitted to participate fully but may not vote. The board may
46 request staff assistance from the director as needed.

2 2. Board meetings and rules. Meetings must be held at least
4 quarterly, or at the call of the chair or at the call of more
6 than 1/2 of the board. In accordance with Title 5, chapter 375,
8 subchapter II, the board in consultation with the director may
10 adopt rules necessary to carry out its responsibilities under
12 this section. The board shall keep minutes of all of its
14 proceedings, which must be a public record available and on file
 in the bureau. Members of the board are entitled to reimbursement
 for direct expenses of attendance at board meetings. A quorum of
 the board for the transaction of business is 4 members. No action
 may be taken by the board unless upon approval by a vote of 4
 members.

16 3. Appeal of decisions by the director. Any person
18 aggrieved by a decision of the director made under section 558-C,
20 subsection 3 may appeal that decision to the board within 30 days
22 of that decision. The board shall review the decision of the
24 director. The board shall give reasonable notice to interested
26 persons. The board may hold a hearing on the appeal and may
28 affirm, modify or reverse the decision of the director. The
 board may allow the record to be supplemented when it finds that
 the evidence offered is relevant and material. The board is not
 bound by the director's findings, but any changes made by the
 board under this subsection must be based upon the board's review
 of the record and any supplemental evidence admitted by the
 board, including evidence in the record of any hearing held by
 the board.

30 Within 45 days of receiving the appeal, the board shall hold a
32 hearing or make findings of fact and issue a decision affirming,
34 modifying or reversing the decision of the director. If a
 hearing is held, a decision must be made within 45 days after
 adjournment of the hearing.

36 All hearings are subject to Title 5, chapter 375, subchapter IV.

38 Sec. 5. Effective date. This Act takes effect January 1, 1996,
40 except that the members of the Submerged Lands Public Trust
42 Review Board must be appointed, effective November 1, 1995.
44 After November 1, 1995, the board shall take action necessary to
 ensure the readiness of the board to comply with this Act on
 January 1, 1996.

STATEMENT OF FACT

2

4 This bill repeals existing law related to the granting of
6 leases and easements for submerged and intertidal lands held in
8 trust by the State and establishes a new procedure for allowing
10 use and construction upon those lands. Entities, public and
12 private, that use submerged lands for fishing, navigation,
14 fowling or other traditional public trust uses are granted
16 exclusive use of the submerged lands without requirement of lease
18 or easement as long as those uses continue. Structures that
 facilitate those traditional uses must be registered and are
 subject to a \$100 registration fee. Structures that do not
 facilitate those uses require a lease from the Bureau of Public
 Lands and payment of a one-time administrative fee of \$100. This
 bill also establishes a Submerged Lands Public Trust Review Board
 with authority to adopt rules governing submerged lands and to
 hear appeals of submerged lands leasing-related decisions made by
 the Director of the Bureau of Public Lands.

Exhibit D. Draft of proposed legislation to amend submerged lands law.

Be it enacted by the people of the State of Maine as follows:

Sec. 1. 12 MRSA. §557-A, sub-§1, is amended to read:

1.Submerged lands Fund. The Submerged lands Fund, in this section called the "fund," is established as a nonlapsing fund to support the efforts of the Bureau of Parks and Lands in managing submerged lands. The fund is administered by the Director of the Bureau of Parks and Lands. Any interest earned on the money in the fund shall be credited to the fund.

Sec. 2. 12 MRSA. § 558-A, sub-§2, is amended to read:

2. Leases. The director may lease, for a term of years not exceeding 30 and with conditions the director deems reasonable, the right to dredge, fill or erect permanent causeways, bridges, marinas, wharves, docks, pilings, moorings, or other permanent structures on submerged and intertidal land owned by the State. The director may refuse to lease submerged lands if the director determines that the lease will unreasonably interfere with customary or traditional public access ways to, or public trust rights in, on or over the intertidal or submerged lands and the waters above those lands. The lease is renewable at any time, subject to the applicable laws, regulations, and public trust principles at the time of renewal, if the lessee is in compliance with all terms of the lease.

Sec. 3. 12 MRSA. § 558-A, sub-§2.A(1), is amended to read:

(f) A reduction factor of ~~10%~~ 2% for upland uses and fill. Upland uses include, but are not limited to, all uses that can operate in a location other than on the waterfront or which are not essential to the operation of the marine industry. Such facilities include but are not limited to, residences, offices, restaurants and parking lots. Fill must include the placement of solid material other than pilings or other open support structures upon submerged lands.

Sec. 4. 12 MRSA. § 558-A, sub-§2, is further amended to read:

D. The director may establish a reasonable minimum rent to which any lease is subject, but it shall not exceed ~~\$75~~ \$100 per year.

E. The maximum rent to which any lease is subject shall not exceed \$1200 per year.

Sec. 5. 12 MRSA. § 558-A, sub-§3, is amended to read:

3. Easements. The director may grant, upon such terms and conditions as the director deems reasonable, assignable easements for a term of years not exceeding 30 for the use of submerged and intertidal lands for the purposes permitted in subsection 2. The ~~lessee~~ grantee shall pay an administrative fee of \$50 for each easement at the time of processing and a registration fee of ~~\$25~~ \$50 due every 5 years. The director may refuse to grant an easement for the use of submerged

lands if the director determines the easement will unreasonably interfere with customary or traditional public access ways to, or public trust rights in, on or over the intertidal or submerged lands and the waters above those lands. The director may grant an easement for submerged lands if a structure:

Sec. 6. 12 MRSA. § 558-A, sub-§6, is amended to read:

6. Constructive Easements. The owners of all structures actually upon submerged or intertidal lands on October 1, 1975, shall be deemed to have been granted a constructive easement for a term of 30 years on the submerged land directly underlying the structure. Beginning on January 1, 1991, the bureau shall undertake a registration program for all structures granted constructive easements. Constructive easements shall be subject to administrative and registration fees for easements pursuant to subsection 3. The director shall develop procedures, rules and registration forms necessary to accomplish the purposes of this subsection. The bureau shall complete the registration of constructive easements on or before December 31, ~~1995~~ 1996.

STATEMENT OF FACT

This bill amends the Submerged Lands Law in accordance with the recommendations of the Submerged Lands Task Force. It reduces the submerged land rental fee for upland uses to the same level as water dependent uses and places an upper limit of \$1200 per year on all submerged land rental fees. It raises the minimum lease fee from \$75 per year to \$100 per year and raises the easement registration fee from \$25 every 5 years to \$50 every 5 years. To offset decreased revenue, the submerged lands fund is changed to an interest bearing account, with the interest accruing to the submerged lands fund. It also assures that leases may be renewed, under applicable laws, rules, and policies, as long as the lessee is in compliance with the terms of the lease. The date for completing the inventory of constructive easements is extended for one additional year.

Exhibit E. Excerpt from a letter from the Maine Marine Trade Association

Members of the Maine Marine Trade Association expressed concern about the summary of the History & Functions of the Submerged Lands Program that was presented in Exhibit A of this report. In order to include their perspective, an excerpt from a letter prepared by Ralph Stevens and Susan Swanton is presented below. The letter had been addressed to the members of the Submerged Lands Task Force. Both Mr. Stevens and Ms Swanton served on the task force as representatives of the Maine Marine Trade Association.

We would now like to turn your attention to an area of discussion on which the task force HAS NOT yet reached consensus: that regarding the degree to which privately owned structures built on and over the submerged lands are said to diminish some people's use of these lands. The membership in Maine Marine Trades Association (our boatyards and marinas) and the owners of commercial fishing wharves firmly believe that the central purpose of our enterprise is to enhance public access; and as such payment of a compensatory lease fee for an alleged loss of access is simply wrong.

In the U.S. Supreme Court decision in the Illinois case, the legal underpinning of the state's authority, the Court said in part: "the interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein".

And, in their 1995 creation (for the first time) of a submerged lands law, North Carolina recognized a fact, that certainly holds true as well for Maine, when it said: "the State is unable to provide the necessary access for its citizens to exercise public trust rights and, therefore, recognizes the role that publicly and privately owned piers, docks, wharves, marinas and other structures located in or over state owned lands covered by navigable waters generally serve in furthering public trust purposes".

The opposing view is that there is a loss to some peoples public trust uses when a structure is created that blocks a canoe from traversing along that piece of shore, a duck blind from being placed there, and a fisherman from setting traps there. However, this marginal loss of some use by a few is more than offset by a greater public use by many. We cannot accept the extreme position that submerged land lease holders, that are creating access and furthering public trust uses, should be penalized for providing this net gain in public access.