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March 24, 2008

George D. Lapointe, Commissioner
Department of Marine Resources
21 State House Station
Augusta, Maine 04333-0021

Dear Commissioner Lapointe:

Your letter of February 14, 2008 asks for the opinion of this office on the issue of whether the public's rights within Maine's intertidal zone include the harvesting of seaweed. Unfortunately, the case law in Maine does not provide a definitive answer to your question.

The owner of shore land property in Maine presumptively holds title to intertidal land subject to the public's right to use that land for the purposes of fishing, fowling and navigation. *Bell v. Wells*, 557 A.2d 168, 171 (Me. 1989). The Maine Law Court has given a "sympathetically generous" interpretation to what is encompassed within the terms "fishing," "fowling" and "navigation," or what is reasonably incidental or related thereto. *Bell*, 557 A.2d at 173. However, on the question whether seaweed harvesting falls within the scope of these public trust rights, the Court's decisions have been inconsistent.

In 1843 the Court held there was no public right to take "sea manure."¹ In *Moore v. Griffin*, 22 Me. 350, the plaintiff brought a trespass action against the defendant for entering

¹ It is not clear what the Court meant by its use of the term "sea manure," which was not defined. We have reviewed a position paper written by David Slade, Esq. on behalf of the Maine Seaweed Council, in which Mr. Slade states that seaweed was, at one time, commonly referred to as sea manure due to its use by the colonists on their agricultural fields and gardens. However, a footnote in an article written by the Marine Law Institute, University of Maine School of Law, the Maine Sea Grant College Program, and the University of Maine Cooperative Extension titled "Public Shoreline Access in Maine – A Citizen's Guide to Ocean and Coastal Law" (available at www.seagrants.umaine.edu/documents/pdf/pubacc04.pdf) states that the terms "sea manure" and "mussel bed manure" generally refer to the organic detritus and waste of marine organisms – suggesting that the term does not include growing seaweed that is attached to rocks.

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Finally, although the issue of seaweed harvesting was not before the Court in *Bell v. Wells*, a 1989 case holding that the public trust doctrine does not include recreational uses such as walking, swimming and sunbathing, the Court included the above quote from *Marshall* in support of its opinion. However, in a dissenting opinion arguing that the Court has recognized limited public recreational rights in the seashore, three of the Court's justices expressly cited *Moore* and *Hill* for the proposition that there is no public right to take seaweed in the intertidal zone. There, the dissent stated "[w]e have prohibited the taking of seaweed from the flats of another. . . [t]he title to the seaweed is in the owner of the flats" *Bell*, 557 A.2d at 187. The Court's citation to these cases suggests that, despite the opinion in *Marshall*, both are still good law.

In summary, it is our view that these decisions create uncertainties concerning the rights of riparian owners and harvesters with respect to seaweed found in the intertidal zone. As such, in the absence of additional guidance from the Law Court, we are unable to provide a more definitive opinion about the scope of these rights.

If you have further questions for my office, please let me know. Thank you.

Sincerely,



G. Steven Rowe
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GSR/tt