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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.seagrant.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.

onto the plaintiff's intertidal land and removing muscle-bed manure. The Court specifically rejected the defendant's contention that the public trust rights included the right to take sand, sea manure and ballast, holding that "[n]o such right of taking sand, sea manure, or ballast is reserved in the grant made to the owner of the adjoining land." *Moore*, 22 Me. at 355.

In 1861 the Court addressed the ownership rights of riparian property owners to alluvial and non-alluvial seaweed found in the intertidal zone. In *Hill v. Lord*, 48 Me. 83, 96, the Court specifically held that the seaweed belonged to the riparian owner, stating further that:

> [T]he right to take seaweed is a right to take a profit in the soil. It does not come within the principles applied to aquatic rights. The subject of it is, in part, a product of the soil in which it is found. And, in regard to that portion which is washed ashore by the tides, though not permanently remaining, the right which the owner of the flats has to it is much more analogous to the *jus alluvionis* of riparian proprietors . . . .

Hill, 48 Me. at 100.[2]

Then, in *Marshall v. Walker*, 45 A. 497, a 1900 case involving a quiet title action concerning upland property and its adjoining flats, the Court suggested that the right to harvest seaweed from the intertidal zone might exist as part of the public trust rights. There, holding that the owner of the upland property also owns the flats in fee subject to the public use for the purposes of fishing, fowling and navigation, the Court stated:

> Others may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water bearing ice, may fish in the water over them, may dig shell fish in them, *may take sea manure from them,* but may not take shells or mussel manure or deposit scrapings of snow upon the ice over them.

(emphasis added).

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[2] In his paper, Mr. Slade argues that the Court's ruling in *Hill* applies only to *alluvial* seaweed – that is, seaweed that is cast high upon the riparian owner's shore by the tide. We do not agree that the decision must be read so narrowly. To the contrary, we believe the language that the Court chose ("*And*, in regard to that portion which is washed ashore by the tides...") indicates that the Court was referring to both alluvial and non-alluvial seaweed.

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
Attorney General

GSR/tt