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RE: The Public Trust and the Harvest of Seaweed within Maine's Intertidal Zone (NSGLC-16-04-02)

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Dear Natalie and Maine Sea Grant Cooperative Extension,

Thank you for providing an opportunity to discuss the legal uncertainty concerning the ownership and harvest of rockweed from the intertidal zone in Maine. In response to your request for a brief overview of the legal concepts and issues, I have summarized the most pertinent statutory and regulatory framework in Maine governing the harvesting of rockweed. I have also included information on key court cases that may inform judicial decision-making.

The legal questions surrounding the harvesting of rockweed are complex. Rockweed - a marine algae that attaches to rocks – defies easy classification. The legal debate focuses on two primary issues:

- Is rockweed harvesting fishing? If so, there might be public rights to harvest pursuant to the Colonial Ordinance and the public trust doctrine.
- Is rockweed alluvial (“of the soil”)? If so, it may belong to the owner of the intertidal land.

To answer these questions, courts must look to common law property doctrines. The common law refers to law developed by the courts, as opposed to the state legislature. In Maine, under the common law, the private ownership of intertidal land is well established. A limited public right to traverse intertidal areas for the purposes of fishing, fowling, and navigation is similarly well established. Where rockweed harvesting falls within these common law doctrines remains unclear.

STATUTES AND REGULATIONS PERTAINING TO THE HARVEST OF MAINE ROCKWEED

Before considering the ownership issue, it is important to note that rockweed is a marine resource. As such, it is subject to state regulation by the Maine Department of Marine Resources (DMR), which has the authority “to conserve and develop marine and estuarine resources.”¹

A permit is required to harvest seaweed in Maine.² Seaweed is defined as “all marine algae.”³ Permits are not required for individuals harvesting less than 50 pounds of seaweed a day for noncommercial purposes; charitable or municipal organizations harvesting for noncommercial use by that organization; or anyone harvesting seaweed that has detached naturally and is dead.⁴

In 2009, the Maine Legislature established the Cobscook Bay Rockweed Management Area (CBRMA).⁵ The Legislature directed DMR to divide the CBRMA into harvest management sectors. DMR is authorized to close areas within the CBRMA to commercial harvest. Closed areas may include various conservation areas, state parks, federal lands, and lobster hatcheries. Individuals seeking to harvest rockweed for commercial purposes within the CBRMA must submit annual harvest plans to DMR for approval.

In 2013, the legislature directed the DMR to develop a statewide fishery management plan (FMP) and establish a permitting process for rockweed harvesting. In response, the DMR convened a Rockweed Fishery Management Plan Development Team (PDT) to create the FMP. Questions regarding the ownership of intertidal rockweed arose during the development of the FMP. The PDT acknowledged the ownership issue but decided it was a legal consideration outside the scope of their work.

COMMON LAW PERTAINING TO THE OWNERSHIP OF INTERTIDAL ROCKWEED

The intertidal zone, the land between the highest and lowest ebb of the tide, is subject to private ownership in Maine. The Colonial Ordinance of 1641/1647 established the low water mark as the dividing line between private property and state submerged lands, thereby granting upland owners title to the intertidal land. Maine is one of only five “low water” states where private title extends to the low water mark. Submerged lands below the low water mark belong to the state of Maine, and are held in public trust.

The Colonial Ordinance recognized and reserved limited public rights in the intertidal zone. Upland property owners in Maine hold title to intertidal land subject to the public rights to use that land for the purposes of fishing, fowling, and navigation.⁶ Whether rockweed harvesting falls within the scope of these public trust rights is unclear.

¹ 12 ME REV. STAT. § 6021.

² *Id.* § 6803.

³ *Id.* § 6001(38-A).

⁴ *Id.* § 6803(2).

⁵ *Id.* § 6803-C.

⁶ *Bell v. Wells*, 557 A.2d 168 (Me. 1989).

Seaweed Harvesting

Maine courts have consistently held that seaweed that washes ashore is exclusively the property of the owner of the underlying land. See *Emans v. Turnbull* (1807) and *Phillips v. Rhodes* (1943). Case law also suggests that attached seaweed belongs to the upland owner. In *Hill v. Lord* (1861), the Maine Supreme Court held that “the right to take seaweed is a right to take a profit in the soil.” According to the court, ownership of the seaweed rests with “the owner of the soil upon which it grows or is deposited.”

The analysis is complicated by some references in the case law to “sea manure.” Sea manure has never been defined by the Maine courts. Some commentators have asserted that sea manure is a reference to seaweed, but that is not clear from the case law. In 1843, in *Moore v. Griffin*, 20 Me. 350, the Maine Supreme Court stated that the public did not have a right to harvest sea manure from the plaintiff’s intertidal land. The court held 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.”⁷

Almost 60 years later, the Maine Supreme Court suggested there might be public rights to harvest sea manure. In *Marshall v. Walker*, 45 A. 497 (1900), while discussing the scope of the public’s right to use intertidal land for the purposes of fishing, fowling, and navigation, the court stated that the public could, among other things, fish, dig shellfish, and “take sea manure from [intertidal lands].”

In a 2008 memo, the Maine Office of the Attorney General concluded that *Hill* and *Moore* remain good law despite the court’s statements in *Marshall*.⁸ The Attorney General’s opinion was based on the Maine Supreme Court’s discussion of the cases in the *Bell v. Wells*.⁹

As a result of the conflicting case law, the legal debate continues. It is not clear how the Maine courts today would treat rockweed. Rockweed biology might turn out to be a crucial consideration. Does it have roots in the soil or is it merely attached to the rocks? Does that matter legally? Would a court today make a distinction between alluvial and non-alluvial seaweed? Or would they hold that *Hill* applies to all seaweed and find that ownership rest with the upland owner?¹⁰

Public Fishing Rights

A separate legal question is whether rockweed harvesting is fishing. Fishing is a protected public trust use recognized in the Colonial Ordinance and under Maine’s public trust doctrine. If rockweed harvesting is fishing, landowners may not be able to restrict the use of their land by the public for that purpose. If it does not fall within the scope of the public easement, however, harvesters would need landowner permission to legally harvest rockweed from privately owned intertidal lands.

⁷ *Moore*, 22 Me. at 355.

⁸ See letter from G. Steven Rowe, Attorney General, to George D. Lapointe, DMR Commissioner, Mar. 24, 2008.

⁹ *Id.*

¹⁰ For another analysis of this debate, see John Duff, *Who Owns the Seaweed*, TCS Bulletin Vol. 25(2) (2003), available at www.thecoastalsociety.org/pdf/bulletin/TCS_25_2e.pdf.

In 2011, in *McGarvey v. Whittredge*, the Maine Supreme Court articulated a two-part test which it used to analyze whether the public had a right to cross intertidal land to engage in scuba diving activities.

To undertake our analysis, we ask two questions. First, does the intended activity fall readily within the *Bell II* categories of “fishing,” “fowling,” or “navigation”? If so, there is no need to continue further. If not, it is necessary to determine whether the common law should be understood to include that activity...¹¹

The first question then is whether rockweed harvesting readily falls within the category of fishing. Over the years, the Maine Supreme Court has recognized that the public right of fishery extends beyond fish. In *Moulton v. Libbey*, 37 Me. 472 (1854), the Court held that harvesting shellfish from intertidal land is a protected public right. Digging for clams was recognized as a public right in *State v. Leavitt*, 105 Me. 76 (1909). The *Leavitt* holding was reaffirmed in *State v. LeMar*, 87 A.2d 886 (1952), when the court further expanded fishing rights to include digging for bloodworms.

In addition to taking into consideration the above cases, courts may also look to state law. For example, Maine Revised Statutes tit. 12 § 6001(17) states that the term “fish” when used as a verb means “to take or attempt to take any marine organism by any method or means.” Rockweed harvesting is therefore classified as fishing under state statutory law. This definition is not necessarily controlling with respect to determining the scope of the public trust easement, but a court might find it an important consideration.

If a court were to find that rockweed harvesting is not like catching fish or digging for shellfish, it would move onto the second part of the test. In part two, the court looks to “whether the common law should be understood to include that activity.” In analyzing this question, a court might look to the seaweed cases discussed above. How have Maine court’s traditionally handled seaweed harvesting? Were public rights to harvest seaweed recognized?

Again, there are no clear answers to these questions. There are conflicting court cases and confusing terminology. Legal uncertainty will continue until a court directly rules on the issue.

Conclusion

Rockweed harvesting from the intertidal zone raises challenging legal questions. Do upland owners own the rockweed? Can they exclude individuals from their land seeking to engage in rockweed harvesting? How will courts approach the issue when faced with discrete cases?

I hope you find this information helpful. Please let me know if you have any additional questions.

Sincerely,



Alexandra Chase

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¹¹ *McGarvey v. Whittredge*, 28 A.3d 620, 634 (2011)