John M. Fitzgerald

Testimony in Support of LD 1776 –

An Act to Allow Citizen Oversight of Department of Environmental Protection and Department of Marine Resources Actions and Rulemaking

Dear Senator Reny, Representative Hepler, and members of the Committee on Marine Resources, I am John M. Fitzgerald, Co-chair of the Legislative Committee of Sierra Club Maine.

I am testifying on behalf of Sierra Club Maine, representing over 22,000 supporters and members statewide. Founded in 1892, Sierra Club is one of our nation's oldest and largest environmental organizations. We work diligently to amplify the power of our 3.8 million members nation-wide as we work towards combating climate change and promoting a just and sustainable economy. To that end, we urge you to vote 'ought to pass' on LD 1776, "**An Act to Allow Citizen Oversight of Department of Environmental Protection and Department of Marine Resources Actions and Rulemaking."**

The bill's number "1776" reminds us of the Declaration of Independence. In that famous Declaration, admired around the world, Thomas Jefferson wrote "We hold these truths to be self-evident: that all men are created equal and endowed by their creator with certain unalienable rights, among which are life, liberty and the pursuit of happiness." Jefferson and his colleagues would all agree that those rights given to all of us include a right to a healthy environment. That right is now recognized as a human right by many nations, the European Union, and The United Nations. The bill number -- 1776 -- reflects how important this bill is for making the right to a healthy environment a reality and not a false hope. This bill provides the actual tools to enable citizens to help enforce the laws that our own state legislature has passed to conserve and protect the natural resources and wildlife of Maine.

LD1776 presents a set of tools that would ensure better than any other that the laws you pass to provide stewardship over the natural resources of Maine will be fully implemented even if the offices initially empowered to implement them are underfunded, short staffed, or blocked in any other way from doing so. Most of these are essential parts of Federal environmental law that have proven their worth and deserve to be adopted at the state level. Nevertheless, if the Committee is reluctant to adopt all of them we will be happy to work with you to enact some of the bill's provisions rather than have you reject them all.

What are the tools of environmental governance and effective participation in that governance?

They are:

1) scientifically valid information that forms the basis for any rule or regulation implementing a general statutory duty to protect health or the environment, which means having the help of expert witnesses to develop and present those facts, and
2) the ability to present that evidence to an administrative agency or a court in the manner required by the Administrative Procedures Act and by the courts when reviewing agencies' actions. And that means having the help of a lawyer who is familiar with the Administrative Law, the environmental laws and the courts of Maine from the beginning of the process until the end.

Both of those requirements are expensive for citizens' groups or the average town, for example, to carry out.

For citizens to have these tools is all the more important in a time when everyone will admit that the agencies whose job it is to do that are underfunded, understaffed and unable by themselves to fully protect our citizens from pollution and degradation of our lands, air and waters. This is in part due to new chemicals, like PFAS, introduced so fast that neither the state nor the Federal agencies can keep up. We learn now that substances that we once thought we could handle safely, from carbon dioxide to methane to hydrogen, have been shown to threaten life as we know it if allowed to remain and accumulate more and more at ever higher levels in the air.

Litigation has become so expensive that valid claims are often stopped by large corporate defendants' lawyers or agencies failing to enforce the law filing one motion after another to exhaust the plaintiffs' budgets or by objecting to standing, not on constitutional grounds, but to invoke "prudential" rules set up by some courts to make it harder to enforce the law.[1] LD 1776 would help correct this by covering the costs of those lawsuits that demonstrate to a sufficient degree that they belong in court to proceed with the full litigation.

LD 1776 Empowers the Departments as well – LD 1776 would support the AG and Departments. It sets up a fund that would help pay their costs of administering permits, not at the taxpayers' expense, but by charging a reasonable fee to cover the costs of the citizen oversight program and of the Departments in administering permits. These fees would be based on the amount of pollution permitted or the amount of a public natural resource consumed for commercial purposes. This approach is based on the Federal Independent Offices Appropriations Act.[2]

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[1] Such as asserting that the plaintiff did not specify clearly enough the alternative s/he wanted during the administrative process so s/he cannot seek judicial review to stop an illegal permit the agency is about to provide.

[2] The Independent Offices Appropriations Act (IOAA) grants broad authority to federal agencies to assess user fees. The fees must be fair and based on the costs to the government and the value of the service provided, among other considerations. Fees collected are deposited in the general fund of the U.S. Treasury and are not directly available to the agency.[7]

The IOAA, codified at 31 U.S. Code § 9701, provides the following guidance for agencies:[8]

> (a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

The Committee Needs to Adopt One Amendment to Ensure That Rejected Petitioners Can Make Use of the Process Established by LD 1776

In order to make this bill effective there is one essential amendment. That amendment would avoid the possibility that a response denying the request would preempt or prevent citizen action or participation. That would defeat the purpose of the bill.

In the last sentence of paragraph 2 of LD 1776, insert after "not responded to the petition" the phrase "**so as to grant the petitioner's request or to begin a proceeding that may do so" – as follows:**

If after 60 days of

19 receipt of the petition, except in the case of likely more immediate irreparable harm under

20 subsection 3, the Department of Environmental Protection, the Department of Marine

21 Resources or the Attorney General has not responded to the petition [**so as to grant the petitioner's request or to begin a proceeding that may do so],** the person may bring

22 an action in the appropriate court to enforce the law or rule or provide relief in law or equity

23 under the law or rule.

Not just any anonymous filing -- Let me also correct one misleading part of the summary of the bill. The bill would allow anonymous filings but it calls for a system for that to apply only when the authorities determine that the person filing the complaint or petition needs the protection from retaliation in order to provide them with the information needed to enforce the law by developing a new or revised rule. Maine has a whistleblower protection law but it does not

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(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

(1) fair; and
(2) based on—

(A) the costs to the Government;
(B) the value of the service or thing to the recipient;
(C) public policy or interest served; and
(D) other relevant facts.[4]

https://ballotpedia.org/Independent_Offices_Appropriations_Act_of_1952#:~:text=The%20Independent%20Offices%20Appropriations%20Act%20(IOAA)%20grants%20broad%20authority%20to,service%20provided%2C%20among%20other%20considerations.

appear to cover all of the instances in which such protection may be needed for this kind of environmental law enforcement.

What's the actual problem we need to solve in Maine?

Lack of Agency Staff and Resources: The problem LD 1776 would help to solve is the lack of agency resources, delays, and under some Administrations, the lack of will, to enforce the laws written by the State Legislature.

Changes in the State or Federal Government Weakening Environmental Protection: The need for laws like LD 1776 is particularly great when Governors, Attorneys General and department heads change, as Maine has seen dramatically in recent decades. If the Federal Government changes significantly and the courts are reluctant to enforce Federal law, as our current Supreme Court is in the process of doing as it pares back agencies' powers to protect the environment, it is up to the states to protect their citizens via state law. So, it is not just a problem we need to correct, but also a greater problem we need to prevent by enacting LD1776 now.

Reducing Air Pollution and Climate Forcing -- One current example that this law could help to solve is the exposure of Mainers to unhealthy levels of air pollutants that are also heating Maine's waters past dangerous levels, driving the lobsters Maine is famous for to Canadian waters and raising sea levels past docks and port facilities all along our coast.

LD 1776 would give to Maine Citizens Tools that Maine's Senator Ed Muskie Helped Add to Federal Environmental Laws and Senator George Mitchell Preserved.

Senator Edmund Muskie was a senior member and then Chairman of the Senate Environment and Public Works Committee in the late 1960s and early 70's when he and "Scoop" Jackson of Washington State and their colleagues wrote most of the fundamental Federal environmental laws that corrected the failures of states to exercise their plenary police powers as they are called to keep our air and water clean and our wildlife safe from extinction. These laws all have citizen suit provisions providing to the successful plaintiff market rate attorneys and expert witness fees when that plaintiff succeeds in enforcing these Federal laws and some states had followed suit by the mid-1980's.[3]

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[3] Virtually all the major civil rights' and environmental' statutes of the 1960's and 1970's included fee provisions, e.g., 42 U.S.C. § 7607(f) (Clean Air Act). For the Federal statutes, see 3 H. NEWBERG, CLASS ACTIONS § 7040 (1977). For surveys of state law, see Ramos v. Lamm, 539 F. Supp. 730, 757-59 (D. Colo. 1982) (Colorado statutes); 4 B. WITKIN, CALIFORNIA PROCEDURE 3267-84 (2d ed. 1971 & Supp. 1981); 8J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE 8301 (1982); Talmadge, *The Award of Attorneys' Fees in Civil Litigation in Washington,* 16GONZ. L. REV. 57 (1980); Note, *Statutory Award of Attorney's Fees in Louisiana,*20 LON. L. REV. 343 (1974); Comment, *Court Awarded Attorneys' Fees in Massachusetts,* 2 W.N. ENG. L. RE\'. 361 (1979); Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule.?* LAW & CONTEMP. PROBS. Winter 1984, at 321.; 42 U.S.C. § 2000e(5)(k) (1976) (employment discrimination); 20 U.S.C. § 1617 (1982) (school desegregation); Civil Rights Attorney's Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976); Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321 (1980). – from "TOWARD A HISTORY OF THE AMERICAN RULE ON ATTORNEY FEE RECOVERY" by JOHN

President Jimmy Carter and Congress began to extend the practice of awarding attorneys' and expert witness fees to public interest participants in Agency proceedings, with the Federal Energy Regulatory Commission (FERC) being an early adopter of the practice.

In 1978 the Consumer Federation of America was helping draft the rules for the Department of Energy to do for itself what FERC was already doing. The U.S. Comptroller General, who works for Congress, had ruled that it was within most agencies' powers to provide such assistance in order to build the best administrative record for the best rules and to ensure that controversies could be worked out early to avoid litigating over the rule after it was promulgated. At that time, I was working, not as a member of the law firm Boasberg, Hewes, Finkelstein and Klores[4], that was helping the CFA with that contract, but as a lawyer and a CFA consultant based at that law firm.

Before we were done, a powerful member of the House Appropriations Committee from West Virginia, Rep. Mollohan, added a "rider" ending the practice at FERC and barring it elsewhere.

FERC had its power to provide such assistance restored by Congress not long after the U.N. Climate Change Conference of the Parties in 2021 in a fitting step toward better informed energy decisions. I happened to have recommended that step in a meeting at that Climate Conference of the Parties in Glasgow with Senator Ed Markey of Massachusetts, who chairs the Subcommittee on Climate, Clean Air and Nuclear Safety of the Senate Environment and Public Works Committee, not knowing that he was probably already working on doing just that. He said he agreed.

Senator George Mitchell of Maine continued to defend and to strengthen these environmental laws when he chaired the same Committee and reported out a stronger Endangered Species Act enacted in 1988 adding a provision designed to enhance state wildlife recovery efforts with the civil fines imposed on those who killed endangered wildlife without a permit among other amendments.

Senators Muskie and Mitchell followed the practice that Congress had adopted one hundred years before in the first voting rights legislation that attempted to help enforce the 14th and 15th Amendments to the Constitution. Congress did that in order to foster the public services provided by these "Private Attorneys General" in areas ranging from anti-trust law to civil rights.

LEUBSDORF, Duke University Law Journal. 1984.
(https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3748&context=lcp)

[4] That firm had helped shape historic preservation law and had become experts in how to assist public interest participants, e.g., "Implications of NSF Assistance to Nonprofit Citizen Organizations" -- https://ntrl.ntis.gov/NTRL/dashboard/searchResults/titleDetail/PB266565.xhtml

"Three federal statutes, the voting rights legislation of 1870, the Interstate Commerce Act of 1887, and the Sherman Act of 1890, allowed successful plaintiffs to recover their legal expenses in addition to liquidated damages, ordinary damages, or a treble damage award." [5]

That voting rights law of 1870 was repealed twenty-four years later as the nation slid backward from reconstruction and the strong position that Maine had led the nation in achieving by sacrificing more soldiers per capita than any other state to end slavery and preserve the union.[6] A new round of Civil Rights laws had to be enacted in the 1960's and those laws also provided for attorneys' fee awards. Without those laws our nation today might still be discriminating on the basis of race or creed as badly as we were decades ago.

Eighty years after Maine helped win the civil war, my father persuaded his Jewish major to integrate their Army Air Corps squadron mess hall in Italy in 1944 when Dad came back from a mission flying behind enemy lines facing anti-aircraft fire to find the African American mechanics who took care of his airplane eating outside in the rain while local town officials who had been collaborating with the Nazis were being hosted inside the warm dry mess hall. It took President Truman another four years to integrate the armed forces overall.

We now face environmental threats just as deadly but slower and quieter than anti-aircraft fire. Foremost is climate change, but poisoned soil, air and water can kill too, often long after toxins build up in the body and do their insidious harm there.

We urge the Committee to help ensure that "unalienable right" to a healthy environment that our Founding Fathers took for granted, but we cannot, by recommending passage of LD1776 – as soon as possible – and well before July 4th.

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[5] 112. Act of May 31, 1870, 16 Stat. 140, §§ 2, 3, *repealed by* Act of February 8, 1894,28 Stat. 36; Act of February 4, 1887, 24 Stat. 379, § 8; Sherman Antitrust Act § 7, 26 Stat. 210 (1890) -- As cited by Leubsdorf in his article, cited in footnote 1.

[6] Rufus King, of Maine, fought in the Revolutionary War and then represented Maine and Massachusetts, which at that time were one state, in the Continental Congress and the Constitutional Convention during which he demanded and got a date in the Constitution to end the importation of slaves. He also drafted the Northwest Ordinance banning slavery in the new states of what is now the Midwest. He later served many years as a Senator from New York chairing the Committee on Roads and Canals which become the same Committee on Environment and Public Works that Muskie and Mitchell chaired a century and a half later. He was the last Presidential nominee of the Federalist Party. (https://www.senate.gov/senators/FeaturedBios/Featured_Bio_KingRufus.htm)