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Via Email

Sen. Cameron Reny, Chair
Rep. Allison Hepler, Chair
Joint Standing Committee on Marine Resources
100 State House Station
Augusta, ME 04333

Re: Fiscal Impact of LD 2003

Dear Senator Reny, Representative Hepler, and Members of the Joint Standing Committee on Marine Resources,

I am writing regarding LD 2003, An Act to Protect Access to Maine's Intertidal Zone, which, if enacted, would cause a substantial fiscal impact. Specifically, LD 2003 would result in multiple takings of private intertidal property rights that would require the State to pay just compensation to landowners along the entirety of Maine's coast.

LD 2003 seeks to grant to the public the right to cut and remove rockweed and other seaweed that is attached to and growing on private intertidal property. LD 2003 also seeks to grant to the public the right to engage in recreation on private intertidal property. However, all of the activities that LD 2003 would permit have been held by the Maine Supreme Judicial Court to be beyond the scope of the public's right to use private intertidal property. As such, LD 2003 would result in an uncompensated taking of private property rights.

Specifically, LD 2003 states, "For purposes of determining public trust rights and common law rights in intertidal land, the harvesting of naturally occurring seaweed or rockweed is deemed to be fishing." However, four years ago the Law Court held the exact opposite: "We conclude that, contrary to [the harvester's] contention, harvesting living rockweed secured to the intertidal bed cannot be seen as either 'fishing' or 'navigation,' even when those terms are interpreted in a 'sympathetically broad and generous' way." *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 20.

The *Ross* Court went further to hold unanimously that even under a broader common law balancing test that accords the public greater rights in private intertidal property, the harvest of rockweed is not a right held by the public:

rockweed attached to and growing in the intertidal zone is the private property of the adjacent upland landowner. Harvesting rockweed from the intertidal land is therefore not within the collection of rights held in trust by the State, and members of the public are not entitled to engage in that activity as a matter of right.

Id. ¶ 33. Former Chief Justice Saufley, an ardent advocate for the expansion of public access to intertidal land, concurred, stating:

even according to the public's common law access rights to the intertidal zone, the public does not have the right to take attached plant life from that property in contradiction to the fee owner's wishes . . . because the taking of attached flora from fee owners was not within the reasonable access contemplated when the *jus publicum* was established.

Id. ¶ 43.

Thus, under common law, the public unequivocally does not have the right to harvest rockweed on private intertidal property. While it is true that the Legislature has the authority to “codify, alter, or abrogate the common law,” *Bell v. Town of Wells*, 557 A.2d 168, 191 (Me. 1989), legislation that results in a taking of private property rights requires the State to pay just compensation. U.S. Const. Amend. V (“nor shall private property be taken for public use, without just compensation”); Me. Const. art. I, § 21 (“Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.”).

LD 2003 would cause a taking of, among other property rights, privately owned intertidal rockweed up and down the Maine coast. To accomplish that taking, the State would need to compensate every intertidal landowner whose land contains rockweed.

As reported by rockweed harvesters to the Maine Department of Marine Resources, the past five years of finalized available data (2017-2021) indicate that 18,350,559 pounds of rockweed are commercially harvested annually.¹ The rockweed harvesting industry has estimated that its annual harvest on the Maine coast only constitutes two percent of the total available rockweed biomass. Based on these rockweed industry figures, we can estimate a total of 917.5 million pounds of intertidal rockweed growing in Maine.

The average dock price for rockweed has ranged from 4.4 to 8.5 cents per pound in recent years. Assuming a dock price of 5 cents per pound, that works out to a rough estimated dock value of \$45.9 million for rockweed growing on intertidal land in Maine.

¹ https://www.maine.gov/dmr/sites/maine.gov/dmr/files/inline-files/Seaweeds.table_.pdf

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In addition, the recreational use provision in LD 2003 seeks to re-enact the language from the 1986 intertidal recreational use statute that was invalidated as an unconstitutional taking in *Bell v. Town of Wells*. That 1986 statute, which is still on the books despite being vacated by the Law Court in 1989, states, “The public trust rights in intertidal land include . . . [t]he right to use intertidal land for recreation.” 12 M.R.S. § 573. The *Bell* Court held that this recreational use provision “takes for public use much greater rights in the intertidal zone than are reserved by the common law and therefore the Act on its face constitutes an unconstitutional taking of private property.” 557 A.2d at 176-77.

LD 2003 would alter the State’s criminal trespass statute to allow “entering or remaining on intertidal land for a purpose authorized by Title 12, section 573,” which is a citation to the invalidated recreational use statute. Thus, LD 2003 seeks to revive the 1986 intertidal recreational use statute that still suffers from the same constitutional defect, namely the taking of private property rights without just compensation. The holding in *Bell* remains the law in Maine. *Ross*, 2019 ME 45, ¶ 33, 206 A.3d 283, 294 (“this case does not present us with the occasion to consider the vitality of the holding in *Bell II*”).

As discussed above, LD 2003 will either require substantial State payment of just compensation to landowners or will result in unconstitutional non-compensated takings. Accordingly, I respectfully request that the Committee seek an analysis of the fiscal impacts of LD 2003 and seek the opinion of the Office of Attorney General regarding its constitutionality.

Sincerely,

A handwritten signature in black ink, appearing to read "Gordon R. Smith". The signature is written in a cursive style with a large initial "G" and "S".

Gordon R. Smith