

January 29, 2015

Rockweed Working Group
Department of Marine Resources
21 State House Station
Augusta, ME 04333

Dear Rockweed Working Group:

Please accept the following comments of the Conservation Law Foundation (CLF) regarding the Rockweed Working Group's (Working Group) recommendations for areas to be closed to commercial rockweed harvesting. CLF is a New England-based, member-supported organization that uses law, science and economics to promote wise use and conservation of the environment. CLF commends and appreciates the Working Group's effort to date. Rockweed is a critical marine habitat, which cannot be managed like a fishery because of its role in providing habitat to numerous species, including fish, shellfish, waterfowl and shore birds. Some of these species, such as cod and purple sandpipers, are experiencing a severe decline in number due to overfishing or other unknown factors. Other species using rockweed habitat, such as American lobster, support a fishery that drives the Maine economy. CLF believes the Working Group should consider the following to augment the work it has done to date:

1. The Working Group should make its meetings more accessible to the public to promote greater governmental transparency and garner increased participation from stakeholders with considerable expertise and experience related to rockweed harvesting and lands that should be off limits to commercial rockweed harvesting. At present, the Working Group has held all but two of its meetings in Bangor during business hours. While the public may attend these meetings and offer comment, the location (and perhaps the time) makes it difficult for many interested and concerned stakeholders to attend. For example, many federal governmental stakeholders, harvesters, owners of coastal conserved lands, and nonprofit organizations such as CLF need to allocate over 4 or more hours of drive time to attend the meetings; this has precluded attendance by many who do not have the budget or time to travel to and from Bangor. Moreover DMR does not stream the meetings or provide a call-in number. These deficits should be remedied. The Working Group should consider rotating meeting locations. But more importantly, the Working Group should provide a call-in number or stream each meeting. The technology to do so is inexpensive and readily available, and would provide a means for important stakeholders to listen to meetings and provide valuable input to assist the Working Group with their critical task.

2. The Working Group should include in its report to DMR a preliminary statement regarding the uncertainty of whether commercial harvesters must obtain landowner permission prior to harvesting rockweed from the intertidal zone. The Working Group's general ground rules state that "[t]he debate over who owns the intertidal rockweed will not be clarified through

this process.” Nonetheless, the relevant law mandates that the group identify “[t]he criteria ... to be used to determine areas to be closed to harvest or areas that are seasonally closed to harvest, and the scientific *or legal reasoning* for each criterion.”12 M.R.S.A. §6807 (emphasis added). Because the Working Group can consider legal reasoning, it should, at a minimum, recommend that the Legislature take further action to clarify the rights of harvesters and landowners to rockweed in the intertidal zone. Below are two reasons why this issue must be addressed:

- Federal law prohibits disturbing, injuring, spearing, poisoning, destroying, collecting or attempting to disturb, injure, spear, poison, destroy or collect any plant or animal on any national wildlife refuge except by special permit unless otherwise permitted. 50 C.F.R. § 27.51. Refuge managers and other personnel are authorized to enforce this provision to protect fish and wildlife and their habitat and prevent their disturbance, to meet these purposes pursuant to Federal, State, and local laws and regulations. 50 C.F.R. §28.21. In fact, federal law makes it a taking to remove any animal or plant from any national wildlife refuge, except as authorized under 50 CFR 27.51 and parts 31, 32, and 33 of the relevant subchapter C. 50 C.F.R. § 27.21. Therefore, at a minimum, the Working Group must consult with the federal government and should close all federal refuge lands to harvesting in accord with federal law, absent permission from refuge managers or other authorized personnel.
- Under state common law, the upland owner holds fee title to the intertidal zone subject to the public’s right to use the intertidal zone pursuant to the public trust doctrine. *See McGarvey v. Whittredge*, 2011 ME 97, ¶ 9, 28 A.2d 620. The scope of the public’s right to use the intertidal zone remains controversial. The State Supreme Court historically has prohibited the public from removing sand, sea manure, ballast, and seaweed on the ground or attached to the ground of the intertidal zone, *Moore v. Griffin*, 22 Me. 350, 355-356 (1843) (the public cannot remove sand, sea manure, ballast) and *Hill v. Lord*, 48 Me. 83, 100 (1861) (the public cannot remove seaweed). This case law has not been overruled, although a later case reasoned that “As we have seen, flats may be owned by an individual in fee. He may appropriate them, within the limits of law, to his exclusive use and possession. When not so appropriated, his possession is constructive rather than actual. He has the right of entry and the right of actual possession, if he choose to exercise it. Until he does, the jus publicum remains. 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 shellfish 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.” *Marshal v. Walker*, 457 A. 497, 498 (Me. 1900)(emphasis added). In 2008, Maine’s Attorney General issued an opinion that the State Supreme Court’s decisions created uncertainties regarding the rights of owners and harvesters to rockweed in the intertidal zone.
<http://www.rockweedcoalition.org/downloads/ME%20AG%20letter%202008.pdf>. In the face of that uncertainty, landowners in twelve towns have registered their opposition to rockweed harvesting on their intertidal properties (568 properties).
<http://www.rockweedcoalition.org/pages/maps.shtml>. **The Working Group should note this conflict in a preliminary statement to its report to the legislature and suggest that the legislature seek an advisory opinion from the State Supreme Court to avoid**

claims by private landowners that rules implementing the state's rockweed management plan constitute an impermissible taking of rockweed.

3. The Working Group should recommend that Cobscook Bay receive the conservation in place under existing Maine law and additional conservation in accord with the evidence presented at the Working Group meetings on the importance of closing significant bird habitat and seal ledges and any further evidence presented to the Working Group. For example, Straight Bay in Cobscook Bay, which is not completely closed under current state law, should be recommended for complete closure as proposed by Maine' Department of Inland Fisheries and Wildlife.

4. To the extent that CLF has been able to follow the meetings of the Working Group, it appears that the scientific focus of the group is too narrow. To date it appears that the Working Group has focused on the impact of rockweed harvesting on seals, shorebirds, sea birds, and waterfowl. The Working Group must broaden its scope to include the impact of commercial rockweed harvesting on other critical marine species, including juvenile cod.

Thank you for considering CLF's comments.

Very truly yours,



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