


June 2019

Defining Fishing, The Slippery Seaweed Slope, Ross v. Acadian Seaplants Ltd.

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Recommended Citation

Rebecca P. Totten, *Defining Fishing, The Slippery Seaweed Slope, Ross v. Acadian Seaplants Ltd.*, 24 Ocean & Coastal L.J. 178 (2019).
Available at: <https://digitalcommons.maine.law.maine.edu/oclj/vol24/iss2/4>

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DEFINING FISHING, THE SLIPPERY SEAWEED
SLOPE, *ROSS V. ACADIAN SEAPLANTS, LTD.*

Rebecca P. Totten

- I. INTRODUCTION
- II. ROCKWEED SEAWEED
 - A. *Biological Characteristics of Rockweed*
 - B. *Harvesting Rockweed in Maine*
- III. CURRENT MAINE DEPARTMENT OF MARINE RESOURCES REGULATIONS
- IV. PUBLIC TRUST DOCTRINE, CASE LAW AND *ROSS V. ACADIAN SEAPLANTS, LTD.*
 - A. *Massachusetts Colonial (or Colony) Ordinance, Intertidal Fee Simple and the Public Trust Doctrine*
 - B. *Caselaw*
 - C. *Ross v. Acadian Seaplants, Ltd.*
- V. RAMIFICATIONS OF THE LAW COURT AFFIRMING THE SUPERIOR COURT'S HOLDING: BENEFITS AND ISSUES
 - A. *Land Owners*
 - B. *Maine Economy*
 - C. *Environmental*
- VI. POTENTIAL SOLUTIONS TO PROMOTE SUSTAINABLE ROCKWEED HARVESTING THAT SUPPORT MAINE BOTH ENVIRONMENTALLY AND ECONOMICALLY
 - A. *Previously Suggested Potential Solutions to Intertidal Zone Property Issues*
 - B. *Current Tax Policies: Overview, Application and Use as Guidelines for a New Tax Incentive Program*
 - 1. *Maine Constitution's Basis for Tax Incentive Programs*
 - 2. *Current Tax Incentive Programs Overview*
 - a. *Maine Coastal Plan/Working Waterfront Tax Law Overview*

- b. *Maine Farm and Open Space Tax Law Overview*
 - i. *Maine Farmland/Agricultural Tax Law Overview*
 - ii. *Maine Open Space Tax Law Overview*
- c. *Tree Growth Tax Law Overview*
- 3. *Implications of Rockweed Harvesting Not Being Fishing to Current Tax Policy Incentives: Applicability, Limits, and Potential for Revision*
 - a. *Working Waterfront Tax Policy: Implications of Rockweed Harvesting Not Being Fishing*
 - b. *Farmland/Agricultural Tax Policy: Implications of Rockweed Harvesting Not Being Fishing*
 - c. *Open Space Tax Policy: Implications of Rockweed Harvesting Not Being Fishing*
 - d. *Tree Growth Tax Policy: Implications of Rockweed Harvesting Not Being Fishing*
- 4. *Proposal for a New Intertidal Vegetation Growth Management Tax Incentive Program*
- 5. *Constitutional Requirements for a New Intertidal Vegetation Growth Management Tax Incentive Program*

VII. CONCLUSION

DEFINING FISHING, THE SLIPPERY SEAWEED
SLOPE, *ROSS V. ACADIAN SEAPLANTS, LTD.*

*Rebecca P. Totten*¹

Abstract

In Maine, the intertidal zone has seen many disputes over its use, access, and property rights. Recently, in *Ross v. Acadian Seaplants, Ltd.*, the Maine Supreme Judicial Court, sitting as the Law Court, held that rockweed seaweed in the intertidal zone is owned by the upland landowner and is not part of a public easement under the public trust doctrine. The Court held harvesting rockweed is not fishing. This case will impact private and public rights and also the balance between the State's environmental and economic interests. This Comment addresses the following points: first, the characteristics of rockweed and the history of harvesting rockweed in Maine; second, the Maine Department of Marine Resources regulations for harvesting rockweed; third, the public trust doctrine, caselaw, and *Ross v. Acadian Seaplants, Ltd.*; fourth, potential ramifications to landowners, Maine's economy, and Maine's environment as a result of *Ross v. Acadian Seaplants, Ltd.*, and; fifth, potential policy solutions for any detrimental economic ramifications and how their implementation can help balance Maine's environmental and economic interests while also balancing private and public rights. The analysis of policy solutions focuses on Maine's current tax policies, their state constitutional basis, applicability to rockweed, now that harvesting rockweed is not fishing, and a proposal for a new Intertidal Vegetation Growth Management Tax Incentive Policy. This Comment concludes that Maine should revise and add to its use-based tax incentive policies, amend Article IX, section 8, clause 2 of the Maine Constitution to include the harvest of intertidal vegetation as a use for the basis of property tax reduction, and implement a new Intertidal Vegetation Growth Management Tax Incentive Policy to encourage property owners to allow sustainable rockweed harvesting on their intertidal property and ensure a balance between economic interests and environmental sustainability.

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* Many thanks to Anthony Moffa, Visiting Associate Professor of Law and Jeff Thaler, Visiting Associate Professor at the University of Maine School of Law for their thoughts and guidance in the writing of this Comment.

I. INTRODUCTION

In the State of Maine, the ocean and its resources have historically been a vital component of the environment and economy. Many residents and visitors recreationally enjoy the beaches, swimming, sailing, and fishing.² Individuals and businesses also rely on the ocean for their careers and businesses' success through lobstering, fishing, clamming, worming, harvesting seaweed, scientific research, tourism, and many other occupations.³ Many individuals and families have private property abutting the ocean on Maine's numerous fingerlike peninsulas.⁴ Through these varied demands on Maine's oceans and coastal property, there is often a tug of war between the many uses and limited resources.⁵ This tug of war takes place on an environmental and economic level and can affect the balance between private and public rights.⁶ Finding a sustainable balance between environmental needs and economic needs, as well as between private and public rights, is a continual adjustment as priorities, demands, uses, and the climate all change.⁷

One coastal area that has seen disputes over its uses, access, and ownership is the intertidal zone.⁸ Since the nineteenth century, Maine courts have addressed a variety of cases regarding seaweed ownership and/or intertidal zone access issues, including two *Bell* cases commonly

2. See *Maine*, SHEPPARD SOFTWARE <http://www.sheppardsoftware.com/usaweb/snapshot/Maine.htm> [<https://perma.cc/749A-YCC8>].

3. See Lori Valigra, *Maine Food Insider: Seaweed harvester focusing on business as crucial court date nears*, MAINEBIZ (July 26, 2017), <http://www.mainebiz.biz/article/20170726/NEWS01/170729963/maine-food-insider:-seaweed-harvester-focusing-on-business-as-crucial-court-date-nears> [<https://perma.cc/7SEF-LRTQ>]; Patrick Whittle, *Mysterious drop in Maine marine worms imperils a valuable fishery*, PORTLAND PRESS HERALD, April 27, 2017, <https://www.pressherald.com/2017/04/27/mysterious-drop-in-maine-marine-worms-imperils-a-valuable-fishery/> [<https://perma.cc/W4SC-AXR3>]; Gulf of Maine Research Institute Jobs, <https://www.gmri.org/about-us/join-our-team/jobs> [<https://perma.cc/S726-C44R>]; MAINE CLAMMERS ASSOCIATION <http://maineclambers.org/> [<https://perma.cc/A9WE-GWGC>].

4. See Julia Noordyk, *State of the Beach/State Reports/ME/Beach Access*, BEACHAPEDIA http://www.beachapedia.org/State_of_the_Beach/State_Reports/ME/Beach_Access [<https://perma.cc/7JR5-3GRN>].

5. See AARON PAUL, EVALUATING THE ECONOMIC BENEFITS OF LAND CONSERVATION IN MAINE A WHITE PAPER PREPARED FOR THE BOARD OF DIRECTORS OF LAND FOR MAINE'S FUTURES 3, 6-9 (2011).

6. See *id.*

7. See *id.*

8. See *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986).

known as the Moody Beach cases.⁹ *Ross v. Acadian Seaplants, Ltd.* is a recent case regarding these same issues.¹⁰ “At issue [in this case] is whether rockweed, a form of seaweed, growing on private intertidal property is private property or a marine product owned by the State in trust for the public.”¹¹ This case will impact not only private and public rights, but will also impact the balance between the State’s environmental and economic interests.

In *Ross v. Acadian Seaplants, Ltd.*, the Maine Supreme Judicial Court, sitting as the Law Court, affirmed the Washington County Superior Court’s holding that rockweed in the intertidal zone is owned by the upland landowner and is not considered part of a public easement under the public trust doctrine.¹² The public trust doctrine grants public access for fishing, fowling, and navigation.¹³ The Law Court affirmed that harvesting rockweed is not fishing.¹⁴ Summary judgment was granted to Plaintiffs, Kenneth W. Ross, Carl E. Ross, and Roque Island Gardner Homestead Corporation.¹⁵ Acadian Seaplants appealed this case to the Law Court.¹⁶ Oral arguments were held in November 2017, and over sixteen months later in March 2019, the Law Court issued its decision affirming the lower court.¹⁷

The Law Court’s decision affirming the lower court’s decision could support the environment and “promote responsible conservation and help resolve conflicting demands on exhaustible resources,”¹⁸ but there also

9. *Bell*, 557 A.2d; *Bell*, 510 A.2d; *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 1, _A.3d_; Orlando E. Delogu, *Public ownership of Maine’s shore: courts got it wrong a Law School Professor’s New Book Argues for New Interpretation*, THE WORKING WATERFRONT (Jan. 29, 2018), <http://www.islandinstitute.org/working-waterfront/%E2%80%8Bpublic-ownership-maine%E2%80%99s-shore-courts-got-it-wrong> [https://perma.cc/D9Z9-QS9F] [hereinafter Delogu, *Public ownership of Maine’s shore: courts got it wrong*].

10. *Ross*, 2019 ME 45, ¶¶ 1-2, _A.3d_.

11. *Ross v. Acadian Seaplants, Ltd.*, No. CV-15-022, 2017 WL 1247566 at *1 (Me. Super. Ct. March 14, 2017).

12. *Ross*, 2019 ME 45, ¶ 2, _A.3d_.

13. *Id.* ¶¶ 9-10.

14. *Id.* ¶ 26, 27 n.10.

15. *Id.* ¶¶ 2, 6.

16. *Id.* ¶¶ 2, 6.

17. *Ross*, 2019 ME 45; Stephen Rappaport, *Highest Maine court hears rockweed case arguments*, THE ELLSWORTH AMERICAN, Nov. 14, 2017, <https://www.ellsworthamerican.com/maine-news/waterfront/highest-maine-court-hears-rockweed-case-arguments/> [https://perma.cc/H85D-2BDA].

18. Brief of Amici Curiae of Pacific Legal Foundation and Property and Environment Research Center, *Ross v. Acadian Seaplants, Ltd.*, at 2, 2019 ME 45, _A.3d_ (No. WAS-17-142).

could be detrimental effects on Maine's seaweed businesses, with some potentially going out of business.¹⁹

This Comment will address the following points. First, the biological characteristics of rockweed seaweed and the history of harvesting rockweed seaweed in Maine will be discussed. Second, the Maine Department of Marine Resources regulations for harvesting seaweed will be reviewed. Third, relevant legal aspects of the public trust doctrine, intertidal zone caselaw, and details of the *Ross v. Acadian Seaplants, Ltd.* case will be summarized. Fourth, potential ramifications to landowners, Maine's economy, and Maine's environment as a result of the Law Court's holding in *Ross v. Acadian Seaplants, Ltd.* will be discussed. Fifth, potential policy solutions for any detrimental economic ramifications and how their implementation can help balance Maine's environmental and economic interests while also balancing private and public rights will be analyzed. This analysis will include an overview of Maine's current tax policies, their state constitutional basis, applicability to rockweed seaweed now that the Law Court held harvesting rockweed is not fishing, and potential for revision or use as a guideline for a new Intertidal Vegetation Growth Management Tax Incentive Policy. Finally, a conclusion that the State of Maine should consider revisions and additions to its use-based tax incentive policies. In conjunction, an amendment to section 8 (Taxation), clause 2 (Assessment of certain lands based on current use; penalty on change to higher use) of Article IX (General Provisions) of the Maine Constitution is recommended. The amendment should clearly include that the harvest of intertidal vegetation can be a property use for the basis of property tax reduction under Maine's tax incentive programs. This would allow the implementation of a new tax incentive program such as an Intertidal Vegetation Growth Management Tax Incentive Policy to encourage property owners to allow sustainable rockweed harvesting on their intertidal land and ensure a balance between economic interests and environmental sustainability.

19. Valigra, *supra* note 3.

II. ROCKWEED SEAWEED

A. *Biological Characteristics of Rockweed*

Rockweed is a type of brown seaweed or algae found in the intertidal zone.²⁰ The most abundant type of rockweed is *Ascophyllum nodosum*.²¹ All species of the scientific classification of *Fucus*, which are found in Maine, can also be called rockweed.²² Rockweed is a core component of Maine's intertidal habitat, and it dominates the middle to lower half of the intertidal zone.²³

Rockweed can maintain its space in the intertidal zone via reproduction and vegetative regeneration.²⁴ Reproduction only occurs during approximately two tidal cycles per year.²⁵ The exact timing of maturation depends on the water temperature.²⁶

Rockweed embryos attach via "holdfasts" to rocks or other hard objects.²⁷ Rockweed does not grow on sand unless there is a hard object to attach to.²⁸ Once rockweed has attached, it remains "stationary" for the rest of its life.²⁹ These "holdfasts" grow and generate seaweed fronds and can regenerate fronds once they are removed either by nature or man.³⁰ However, if severe destruction occurs to rockweed, removing the entire fronds and its holdfast, other types of seaweed may quickly replace it before it can regenerate.³¹ It can take years for rockweed to recover from

20. Appendix at 30, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142); *Rockweed Fact Sheet*, THE UNIVERSITY OF MAINE, <https://extension.umaine.edu/signs-of-the-seasons/indicator-species/rockweed-fact-sheet/> [https://perma.cc/3JB7-NLK4].

21. Appendix at 30, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142); ME. DEP'T OF MARINE RES., FISHERY MANAGEMENT PLAN FOR ROCKWEED (*ASCOPHYLLUM NODOSUM*) at 2 (2014).

22. ME. DEP'T OF MARINE RES., *supra* note 21, at 2.

23. *Id.* at 3.

24. *Id.* at 5.

25. *Id.*

26. *Id.*

27. Appendix at 30-31, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142); ME. DEP'T OF MARINE RES. *supra* note 21, at 4.

28. Appendix at 30, *Ross v. Acadian Seaplants Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142).

29. *Id.* at 31.

30. ME. DEP'T OF MARINE RES., *supra* note 21, at 4.

31. See Appendix at 32, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142);

ME. DEP'T OF MARINE RES., *supra* note 21, at 4.

this type of destruction and return to its initial height and biomass.³² Rockweed typically will grow to be two to four feet tall.³³ However, it can grow to be six feet or taller.³⁴ Rockweed's fronds typically exhibit a branching pattern which causes the majority of the plants biomass to be contained in the upper part of the rockweed.³⁵

“Unlike the roots of trees and most other terrestrial plants, rockweed does not use its holdfast to extract nutrients from the soil. The holdfast functions solely to keep the rockweed in place. Rockweed receives its nutrient directly from the sea and the air.”³⁶ This is similar to “[s]ome terrestrial plants [that] do not have roots that extract nutrients from the soil.”³⁷

The Maine Department of Marine Resources has categorized seaweed as a marine organism and the harvesting of seaweed as fishing.³⁸ However, this is not legally binding.³⁹ Additionally, as the parties in *Ross v. Acadian Seaplants, Ltd.* stipulated, rockweed is a marine plant.⁴⁰

In *Ross v. Acadian Seaplants, Ltd.*, the biological characteristics of rockweed are not in dispute.⁴¹ However, the application of those biological characteristics to the question of whether rockweed should be legally analyzed narrowly as a marine plant or broadly as a marine organism are crucial to the case.⁴² The biological characteristics are crucial because they affect the legal definition of fishing and whether harvesting of rockweed is considered to be fishing or not.⁴³

32. Appendix at 32, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142).

33. *Id.* at 30.

34. *Id.*

35. *Id.* at 31.

36. *Id.*

37. *Id.*

38. Appellant Oral Arguments, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142) http://penbay.org/rockweed_2017/rockweed_supjudct_111417_oral_arguments_complete_42min32sec.mp3 [<https://perma.cc/N93P-SFPW>].

39. ME. DEP'T OF MARINE RES., *supra* note 21, at 1; Oral Arguments at 08:33 to 08:50, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142) http://penbay.org/rockweed_2017/rockweed_supjudct_111417_oral_arguments_complete_42min32sec.mp3 [<https://perma.cc/N93P-SFPW>].

40. Oral Arguments at 28:56 to 29:15, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142) http://penbay.org/rockweed_2017/rockweed_supjudct_111417_oral_arguments_complete_42min32sec.mp3 [<https://perma.cc/N93P-SFPW>].

41. *Id.* at 28:56 to 29:51.

42. *Id.* at 40:05 to 41:43.

43. *Id.* at 11:43 to 12:40.

B. Harvesting Rockweed in Maine

The coast of Northern New England is one of the most productive areas in the world for seaweed growth.⁴⁴ Rockweed is one of over 250 species of seaweed present on the Maine coast.⁴⁵ Although it can be found elsewhere, its primary habitat is the east coast of North America.⁴⁶ Some of the many uses for seaweed include fertilizers, cosmetics, animal feed, products for human consumption, and supplements for animals and humans.⁴⁷ Seaweed has been used for human consumption for over four millennia.⁴⁸ Maine is the home of seaweed harvesting and several seaweed processing plants.⁴⁹ “In Maine, rockweed was traditionally harvested for fertilizer and seafood packing material,” (e.g., for packing Maine lobster or worms for shipment).⁵⁰ Acadian Seaplants uses rockweed in animal feed and natural fertilizers.⁵¹ Currently, most of the rockweed harvested in Maine is used either for nutritional supplements for animals or humans, or as fertilizers.⁵² Rockweed can also be used in medicinal tinctures and as a powder in drinks and teas.⁵³ Rockweed “products are used widely throughout the US in agriculture and related applications (e.g., Maine potatoes, California wine grapes, Washington state apples, North Carolina soybeans, Florida oranges, and Kentucky race horses).”⁵⁴ “Maine’s rockweed products are also shipped internationally. . . .”⁵⁵

Although the harvest of seaweed has been occurring for ages, it was not until the 1970s that large scale commercial harvesting of rockweed began in Maine.⁵⁶ In 1971, North American Kelp was established in Boothbay, followed by Source Maine in the Casco Bay region in 1981,

44. Mitchell W. Feeney, *Regulating Seaweed Harvesting in Maine: The Public and Private Interests in an Emerging Marine Resource Industry*, 7 *Ocean & Coastal L.J.* 329, 333 (2002).

45. *Id.* at 333-34.

46. *Id.*

47. *Id.* at 334-35; ME. DEP’T OF MARINE RES., *supra* note 21, at 26.

48. Feeney, *supra* note 44, at 334.

49. *Id.* at 336, 345.

50. ME. DEP’T OF MARINE RES., *supra* note 21, at 17; *Resources for Seaweed Growers*, MAINE SEA GRANT, <https://www.seagrant.umaine.edu/aquaculture/resources-for-seaweed-growers> [<https://perma.cc/47GV-AJNM>].

51. Valigra, *supra* note 3.

52. ME. DEP’T OF MARINE RES., *supra* note 21, at 26.

53. *Rockweed*, MAINE COAST SEA VEGETABLES, http://www.seaveg.com/shop/index.php?main_page=index&cPath=26 [<https://perma.cc/72XB-NZET>].

54. ME. DEP’T OF MARINE RES., *supra* note 21, at 26.

55. *Id.* at 27.

56. *Id.* at 17.

Ocean Organics in Waldoboro in 1991, and Acadian Seaplants in Cobscook Bay in 1999.⁵⁷

In the 1980s, statutes established harvesting permits and violation fees.⁵⁸ During the 1990s, the Maine Seaweed Council was formed, and more evaluation of seaweed protection and management practices occurred.⁵⁹ Starting in 2000, the Maine Department of Marine Resources (DMR) began to require more specific harvesting criteria and limits.⁶⁰ In 2014, DMR and the Rockweed Plan Development Team created the Fishery Management Plan for Rockweed (*Ascophyllum nodosum*).⁶¹ Some of the harvesting criteria and limits are to maintain harvest records, to submit those records to the DMR, and to leave at least sixteen inches of rockweed above the seaweed's attachment point when harvesting.⁶² There are additional requirements for Cobscook Bay that include yearly harvest plans, maximum annual harvest rates, and restrictions on some areas that are closed to rockweed harvesting.⁶³

In the past ten years, rockweed harvesting in Maine has dramatically increased.⁶⁴ Prior to 2007 it was rare to see more than 7.6 million pounds of rockweed harvested in a year.⁶⁵ From 2008 and on more than 11.6 million pounds per year was harvested, "with a high of 19.4 million pounds in 2014."⁶⁶ "[I]n 2016, . . . close to 14 million pounds [of rockweed,] worth \$468,105[, was] harvested in Maine, according to DMR figures"⁶⁷ The percentage of rockweed harvested out of all types of seaweed harvested in Maine has also gradually increased.⁶⁸ During the five-year period of 2008 to 2012, rockweed consisted of over ninety-five percent of all types of seaweed harvested on a per-weight basis.⁶⁹

Rockweed can be harvested via several methods. The most common methods are by hand using a knife or cutting rake, or mechanically using a mechanical harvesting boat.⁷⁰ Harvesting by knife is the most labor

57. *Id.*

58. PETE THAYER & CATHERINE SCHMITT, ROCKWEED ECOLOGY, INDUSTRY & MANAGEMENT (2013).

59. *Id.*

60. *Id.*

61. ME. DEP'T OF MARINE RES., *supra* note 21, at 1.

62. *Id.* at 27.

63. *Id.*

64. Valigra, *supra* note 3.

65. *Id.*

66. *Id.*

67. *Id.*

68. ME. DEP'T OF MARINE RES., *supra* note 21, at 19-20.

69. *Id.*

70. *Id.* at 22.

intensive as it requires manually selecting plants and cutting them with a knife or machete.⁷¹ It can be done either at low tide on foot or at mid-tide from a boat.⁷² Because it is so time consuming and labor intensive, this method is not typically used for harvesting large volumes of rockweed.⁷³ Harvesting by rake is the second most labor-intensive method.⁷⁴ It must be done by boat at mid-flood to mid-ebb tide.⁷⁵ The boat does not drop an anchor and drifts with the tide.⁷⁶ Harvesters use a rake with a sharp cutting edge to cut the floating rockweed and pull it into the boat.⁷⁷ This method makes it difficult to cut in a uniform pattern, leaving significant portions of rockweed uncut, and it is difficult to create an even sixteen-inch cut.⁷⁸ The least labor-intensive method is mechanical harvesting.⁷⁹ Mechanical harvesting is done in flat-bottomed boats that are designed to suction, cut, and collect rockweed.⁸⁰ The mechanical harvesters are designed in a way that, although they may not cut uniformly, they can set a cut height to “ensure they leave at least sixteen inches of rockweed.”⁸¹ Like the raking method, some randomness in the harvest area pattern occurs.⁸² Here, it is due to operators trying to harvest from the most resourceful areas.⁸³ The cut height of the rockweed may also vary due to effects of changing winds, tides, and currents.⁸⁴

Harvesting methods are important for environmental and economic reasons. Initially, although mechanical harvesters were thought to be efficient, they were also thought to be detrimental to the environment.⁸⁵ Newer mechanical harvesters now have several features that some argue make them more environmentally sustainable and could potentially benefit the environment.⁸⁶ First, the guard and other aspects of the cutting feature

71. *See id.* at 23.

72. *See id.*

73. *See id.*

74. *See id.* at 22.

75. *Id.*

76. *See id.*

77. *Id.*

78. *Id.*

79. *See id.* at 24-25.

80. *Id.* at 24.

81. *Id.* at 25; Greg Tobey, *Rockweed Harvesting*, MAINE SEAWEEED COUNCIL <http://www.seaweedcouncil.org/rockweed-harvesting/> [<https://perma.cc/X7P4-GFYW>].

82. ME. DEP'T OF MARINE RES., *supra* note 21, at 25.

83. *Id.*

84. *Id.*

85. Tobey, *supra* note 81; THIERRY CHOPIN & RAUL UGARTE, *THE SEAWEEED RESOURCES OF EASTERN CANADA* 24 (2006).

86. Tobey, *supra* note 81.

protect against more rockweed being cut than intended.⁸⁷ Second, the suction is mild and reduces the risk of the rockweed being ripped off by the holdfast.⁸⁸ Third, mechanical harvesters appear to reduce bycatch of other organisms such “snails, crabs, fish, eels and other creatures.”⁸⁹ It is thought that this reduction in the bycatch may be because of the guards and that the harmonics of the boat and mechanical system provide warning to the other organisms.⁹⁰ Mechanical harvesters, when used properly, may be one tool for achieving environmental sustainability while continuing to harvest rockweed.⁹¹ However, if used improperly, they have the potential to harvest rockweed much quicker than the other methods and could thus be detrimental to the environment.⁹² “The [most important] key to sustainability is not the method of harvest so much as the amount of the harvest and the care of the harvester.”⁹³

Although there is minimal published analysis available on the economic impacts of the harvesting methods, it seems reasonable that the methods used would have various economic impacts. Some have thought that hand-raking is better for the economy as it is more labor intensive and thus requires more employees.⁹⁴ The more technical features of the mechanical harvesters, however, would likely mean there would be more individuals hired to manufacture the mechanical harvesting boats. Additionally, more cost versus sustainability analysis should be done to determine if newer mechanical harvesters can have a minimal impact on the environment while making the time required to harvest rockweed more efficient.

In 2012, the majority of rockweed was harvested using hand raking methods while mechanical methods were used forty percent of the time.⁹⁵ Acadian Seaplants harvests from boats via the raking method.⁹⁶ As limited by statute, Acadian Seaplants harvests no more than “17% of the biomass within a particular management area in Cobscook bay.”⁹⁷

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *MSC Harvester Information*, MAINE SEAWEED COUNCIL <http://www.seaweedcouncil.org/msc-harvester-information/> [<https://perma.cc/S9YT-9579>].

93. MAINE SEAWEED COUNCIL, *HARVESTER’S FIELD GUIDE TO MAINE SEAWEEDES* 10 (2014).

94. CHOPIN & UGARTE, *supra* note 85, at 24.

95. ME. DEP’T OF MARINE RES., *supra* note 21 at 19.

96. Appellant Brief at 6-7, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142).

97. *Id.* at 7.

The sale price of rockweed purchased at the dock is fairly low. However, the majority of rockweed is processed further for wholesale or retail products.⁹⁸ This further processing increases the overall value of rockweed to the State of Maine and the rockweed industry.⁹⁹ The industry provides jobs for “operators, research and development, harvesters, processing facility employees, [and] marine equipment retailers.”¹⁰⁰

In order to transport large volumes of harvested rockweed to the processing plants, the harvesters must have access to a dock with a boom crane nearby.¹⁰¹ This boom crane is used to transfer the rockweed from boats to trucks for transportation.¹⁰² Working waterfronts are thus crucial to large commercial scale rockweed operations.¹⁰³

III. CURRENT MAINE DEPARTMENT OF MARINE RESOURCES REGULATIONS

In 2013, the Maine Legislature passed bill LDR585 to develop “a statewide approach to seaweed management” and a seaweed fisheries management plan.¹⁰⁴ As a result of LDR585, the Rockweed Fishery Management Plan Development Team (PDT) was created.¹⁰⁵ This group was put together by the Commissioner of the Maine Department of Marine Resources (DMR) and represented a broad spectrum of groups with a vested interest in rockweed.¹⁰⁶ It included individuals from environmental organizations, industry, and academia.¹⁰⁷ This PDT came up with the January 2014 Maine Department of Marine Resources Fishery Management Plan for Rockweed (*Ascophyllum nodosum*) (“management plan”).¹⁰⁸ The Management plan stated that it “consider[ed] the recommendations in [the] . . . document to be the starting point for establishing coastwide rockweed management.”¹⁰⁹ Additionally, the plan (and LD585, Sec. 2) made clear that it was not addressing the outstanding

98. ME. DEP’T OF MARINE RES., *supra* note 21, at 26.

99. *Id.*

100. *Id.*

101. *Id.* at 25.

102. *Id.*

103. *See id.*

104. *Id.* at 1.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

legal question of who owns intertidal seaweed.¹¹⁰ “The statutory framework by which DMR regulates marine resources has no place in determining property rights, including public easements, which are typically determined by common law.”¹¹¹

The management plan “is intended to summarize background information about rockweed (science, fishing methods, products, etc.) and provide management framework recommendations for the long-term management of the rockweed fishery.”¹¹²

IV. PUBLIC TRUST DOCTRINE, CASE LAW AND *ROSS V. ACADIAN SEAPLANTS, LTD.*

A. *Massachusetts Colonial (or Colony) Ordinance, Intertidal Fee Simple and the Public Trust Doctrine*

The Massachusetts Colonial (or Colony) Ordinance of 1641-47 established that the fee simple of a property bound by tidewater “extend[s] from the high water mark over the shore or flats to the low water mark, if not beyond one hundred rods.”¹¹³ This was intended as an incentive for property owners to build wharfs during an era when marine travel was critical.¹¹⁴ However, this fee simple was not absolute and included the public trust doctrine, which “by common law, reserved out of the fee title of the upland owner . . . a public easement for fishing, fowling, and navigation.”¹¹⁵ This intertidal zone ownership and public trust doctrine included Maine when it was part of the Massachusetts Colony.¹¹⁶ Maine and Massachusetts were the only colonies to have these laws.¹¹⁷ In other states, the state owns the intertidal zone and holds it in trust for the public’s benefit.¹¹⁸ Maine’s common law has continued to follow the Colonial

110. *Id.*

111. *Ross v. Acadian Seaplants, Ltd.*, No. CV-15-022, 2017 WL 1247566 at *4 (Me. Super. Ct. March 14, 2017).

112. ME. DEP’T OF MARINE RES., *supra* note 21, at 1.

113. Feeney, *supra* note 44, at 337.

114. *Id.* at 337-38.

115. *Ross* at *2 (citing *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989)).

116. Feeney, *supra* note 44, at 338.

117. *Id.*

118. HANNAH E. KING, ROCKWEED HARVEST AND THE PUBLIC TRUST 3 (2009) (unpublished comment), https://www.rockweedcoalition.org/downloads/seaweed_harvest.pdf [<https://perma.cc/US8E-UL7U>].

Ordinance although “the Maine Legislature has never expressly adopted [it.]”¹¹⁹

B. Caselaw

Maine courts have seen many cases revolving around marine resources, beaches, and the intertidal zone. Most of these cases revolve around the public trust doctrine, however some rely on the right to take profit in the land.

In 1854, *Moulton v. Libbey* stated that shellfish, including clams, are included in the public trust’s common right to fishing and can be regulated by the State.¹²⁰

In 1861, the Court in *Hill v. Lord* held that “a right to take seaweed is not an easement, but is a right to take a profit in the soil.”¹²¹ In *Hill*, this right belonged to the “owner of the flats.”¹²² However, the parties in *Ross v. Acadian Seaplants, Ltd.* disagree as to whether the *Hill v. Lord* statement regarding seaweed ownership is holding of the Law Court or dicta and whether it applies to both living and dead seaweed or just to dead seaweed.¹²³

The Court in *Hill* also held that this right to take a profit from the soil is not a right that can be acquired by the public through custom.¹²⁴ This makes rights to take a profit from the soil different from rights that the public has, or can argue they have, under the public trust doctrine.

In 1952, the Law Court stated in *State v. Lemar* that worms are included in the public trust’s common right to fishing, which can be regulated by the State, and the legislature can delegate this power to regulate worming to the town.¹²⁵ Later in 1981, in *James v. West Bath* the Court affirmed that a worm digger did not need to get a license from the town of West Bath, when the State had not specifically “delegated its power to regulate and control its marine resource-marine worms” to the town, because the intertidal zone areas, “including marine worms, are held

119. *Id.* at 4.

120. *Moulton v. Libbey*, 37 Me. 472, 492-94 (1854).

121. *Hill v. Lord*, 48 Me. 83, 100 (1861).

122. *Id.*

123. Appellee’s Brief at 20-21, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, A.3d (No. WAS-17-142); Appellant’s Brief at 22, *Ross v. Acadian Seaplants Ltd.*, 2019 ME 45, A.3d (No. WAS-17-142).

124. *Hill*, 48 Me. at 100.

125. *State v. Lemar*, 147 Me. 405, 409, 87 A.2d 886, 887-88 (1952).

by the State in a public trust for the people of the State” and regulated by the State and not the towns.¹²⁶

In the late 1980s the Law Court, in *Bell I* and *Bell II* (the Moody Beach Cases), made it clear that the public trust doctrine did not include a public right for recreation such as “bathing, sunbathing and walking on privately owned intertidal land.”¹²⁷ These recreational activities were not considered to be “reasonably related to fishing, fowling, or navigation.”¹²⁸

Although public trust rights for worming and clamming had been affirmed through litigation, prior to 1989 no Maine court had specifically been called on to draw a firm line between what was private property and what rights the public had to use the intertidal zone.¹²⁹ “[T]he Moody Beach decisions, [however,] made clear that the restrictive definition of public use rights in the intertidal zone is a reality that cannot be altered by wishing it away, by adopting expansive police power regulations, or by fashioning arguments predicated on the public trust doctrine.”¹³⁰ These cases ultimately held that the Massachusetts Colonial Ordinance applied to Maine and as a result all title to the intertidal zone was to the upland owners.¹³¹

“[A]ll of the case law describes the private owner's title to the intertidal zone as in fee It remains that for the public to have a right it still must derive from some form of easement right or *jus publicum* [(public trust doctrine)].”¹³²

However, contrary to the holding in the Moody Beach cases, there is some argument that the *Bell* cases were decided inaccurately and that Maine’s intertidal zone was never intended to be the private property of the upland owner.¹³³ Orlando Delogu argues that prior to the Moody Beach cases it was not generally perceived “that upland owners had title to

126. *James v. West Bath*, 437 A.2d 863, 864-66 (Me. 1981).

127. *Bell v. Town of Wells*, 557 A.2d 168, 174-76 (Me. 1989) (“Bell II”); *See Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986) (“Bell I”); King, *supra* note 118, at 4.

128. *Bell v. Town of Wells*, 557 A.2d 168, 171, 173 (Me. 1989).

129. *See James*, 437 A.2d at 864-66; *Moulton v. Libbey*, 37 Me. 472, 492-94 (1854); Orlando E. Delogu, *An Argument to the State of Maine, the Town of Wells, and Other Maine Towns Similarly Situated: Buy the Foreshore—Now*, 45 ME. L. REV. 243, 244 (1993) [hereinafter Delogu, *An Argument to the State of Maine*].

130. Delogu, *An Argument to the State of Maine*, *supra* note 129, at 244.

131. Delogu, *Public ownership of Maine’s shore: courts got it wrong*, *supra* note 9.

132. *Ross v. Acadian Seaplants, Ltd.*, No. CV-15-022, 2017 WL 1247566 at *3 (Me. Super. Ct. March 14, 2017) (citing *See Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989); *McGarvey v. Whittredge*, 2011 ME 97, ¶¶ 16, 32, 28 A.3 620).

133. ORLANDO E. DELOGU, MAINE’S BEACHES ARE PUBLIC PROPERTY, THE BELL CASES MUST BE REEXAMINED 10 (2017) [hereinafter MAINE’S BEACHES ARE PUBLIC PROPERTY].

intertidal land” in Maine.¹³⁴ Delogu offers some of the following support for this argument. Historically, in property law there are “some things incapable of private ownership” and public trust principles as seen in “Roman law and English common law” are contrary to intertidal land being held as private property.¹³⁵ “[T]he Act of Separation between Maine and Massachusetts” also shows intent that the “Maine Legislature has the power and right to fashion its own intertidal land law.”¹³⁶ Maine’s legislation, specifically the 1975 Submerged Land Act and its 1981 amendment, as sustained by an *Opinion of the Justices*, indicates that intertidal property was thought to be owned by the State except for where the State had given it to individuals for commercial “wharfing out.”¹³⁷ Additionally, in *Illinois Central* the United States Supreme Court held that “intertidal land of an *entire* state may not be alienated” and it is owned by the state.¹³⁸ Finally, Massachusetts’ original grants of land to settlements in Maine show that intertidal lands were not alienated and were retained under public ownership.¹³⁹ “[G]rants of land to new settlers ran from the ‘high water mark’ or the ‘seawall’ landward—they did not include the intertidal flats.”¹⁴⁰

In *Ross v. Acadian Seaplants, Ltd.* the appellants could have challenged the validity of the Moody Beach cases, however, they did not.¹⁴¹ Although *Bell II* was not “ultimately dispositive in *Ross*, the Concurrence of Chief Justice Saufley, Justice Mead, and Justice Gorman state that they would have used this opportunity to explicitly overrule *Bell II*.”¹⁴²

In 2011, the Law Court held in *McGarvey v. Whittredge* that a scuba diver walking across the intertidal zone to reach the ocean was protected by the public trust rights.¹⁴³ Here, however, the Court split on the rationale they chose to analyze these rights. The first analysis of public rights supported interpreting these public rights broadly using common law *jus publicum* and a reasonable balance test between the rights of private

134. *See id.* at 8, 142.

135. *See id.* at 9.

136. *See id.* at 10.

137. *See id.* at 9-10, 15, 111-15.

138. *See id.* at 9-10, 61 (emphasis added).

139. *See id.* at 144.

140. *See Id.* at 144.

141. Appellant’s Brief, *Ross v. Acadian Seaplants Ltd.* 2019 ME 45, _A.3d_ (No. WAS-17-142); *Maine Calling, Intertidal Zones*, MAINE PUBLIC RADIO (Feb. 21, 2018) (downloaded using Player FM) (Citing Orlando E. Delogu).

142. *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 35, _A.3d_.

143. *McGarvey v. Whittredge* 2011 ME 97, ¶ 58, 28 A.3d 620.

owners and public use.¹⁴⁴ The concurrence supported the doctrinal view requiring a use to be “fishing,” “fowling”, or “navigation” in order to be protected by the public trust doctrine, but allowed a “sympathetically generous and broad” interpretation of these terms.¹⁴⁵

Almeder v. Town of Kennebunkport is a current case that also involves public beach access and related public trust issues.¹⁴⁶ This case has been heard by the Law Court on other issues, remanded, and is now currently back on appeal to the Law Court.¹⁴⁷ The issues addressed on appeal this time are related to the public trust doctrine.¹⁴⁸ Oral arguments were heard for this case on May 15, 2019.¹⁴⁹

C. *Ross v. Acadian Seaplants, Ltd.*

In *Ross v. Acadian Seaplants, Ltd.* the plaintiffs, Kenneth W. Ross, Carl E. Ross, and Roque Island Gardner Homestead Corporation, own coastal property in Washington County, Maine.¹⁵⁰ Over the six years preceding this case, the defendant, Acadian Seaplants, Ltd., has been harvesting and removing rockweed seaweed, from the intertidal zone of plaintiffs’ property, without the plaintiffs’ consent.¹⁵¹ The defendant did not walk on the plaintiffs’ land to access the rockweed and utilized a watercraft to harvest and remove the rockweed, while floating in the water at mid-tide.¹⁵²

On motions for summary judgment, the Washington County Superior Court held that rockweed in the intertidal zone is owned by the landowner and not considered part of a public easement under the public trust doctrine, which grants public access for fishing, fowling, and navigation.¹⁵³

144. *Id.* ¶¶ 37-39, 49-50, 53, 57.

145. *Id.* ¶¶ 62, 71 (Levy, J., Alexander, J., and Gorman, J. concurring).

146. *Maine Beach Access Litigation*, SURFRIDER FOUNDATION <https://www.surfrider.org/campaigns/maine-beach-access-litigation> [<https://perma.cc/658Y-8TN4>].

147. *Id.*

148. *Id.*

149. *Supreme Court Oral Argument Schedule & Summaries*, MAINE.GOV, STATE OF MAINE JUDICIAL BRANCH https://www.courts.maine.gov/maine_courts/supreme/oral_arguments_schedule.shtml [<https://perma.cc/55ZA-HMLK>].

150. *Ross v. Acadian Seaplants, Ltd.*, No. CV-15-022, 2017 WL 1247566 at 1 (Me. Super. Ct. March 14, 2017).

151. *Id.*

152. *Id.*

153. *Id.* at 3-4.

The Superior Court came to this conclusion for two reasons. First, [i]n Maine, unless previously severed, the owner of coastal property also holds fee title to the land that is exposed between high tide and low tide, but not beyond a distance of 100 rods. *Bell* at 172. [Acadian Seaplants did] . . . not challenge Plaintiffs' ownership in this intertidal zone. JSMF §§ 1-3, 8-10. Based on *Hill v. Lord* the rockweed growing on Plaintiffs' intertidal property is a profit that belongs to Plaintiffs, and [thus is] not subject to a public easement.¹⁵⁴

Second,

[The Superior] . . . court [did]. . . not find harvesting a plant such as rockweed to be a form of any of the three identified [public access] activities. Harvesting a terrestrial plant is no more a fishing activity, such as worming, digging for mussels, trapping lobsters or dropping a line for fish clearly are, than is harvesting a tree the same as hunting or trapping wildlife, Rockweed is a terrestrial plant, JSMF §§11,12,15,16,20. The harvesting of rockweed cannot be said to be a form of fishing, fowling or navigating.¹⁵⁵

The Superior Court granted summary judgment to the plaintiffs.¹⁵⁶ Acadian Seaplants appealed this case to the Law Court.¹⁵⁷ Evidence of how important this case is can be seen by the stack of thirteen amicus briefs filed in regards to this case.¹⁵⁸ Seven of these amicus briefs support the landowners (plaintiffs/appellees) and six support Acadian Seaplants (defendant/appellant).¹⁵⁹ Oral arguments were heard by the Law Court on November 14, 2017.¹⁶⁰

On March 28, 2019, over sixteen months later, the Law Court issued its decision affirming the lower court.¹⁶¹ The Court held “that rockweed in the intertidal zone belongs to the upland property owner and therefore is

154. *Id.* at 3.

155. *Id.*

156. *Id.* at 4.

157. Appellant's Brief, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142).

158. *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45 n.1, _A.3d_.

159. Rappaport, *supra* note 17.

160. *Ross*, 2019 ME 45.

161. *Id.*

not public property, is not held in trust by the State for public use, and cannot be harvested by members of the public as a matter of right.”¹⁶²

The facts in this case were not in dispute and thus the Court “review[ed] summary judgment de novo for errors of law in the court’s interpretation of the relevant concepts.”¹⁶³ The majority analyzed the issue of whether “living rockweed, growing on and attached to intertidal land is . . . the private property of the adjoining upland landowner who owns the intertidal zone in fee or . . . a public resource held in trust by the State” under two different doctrinal views “regarding the nature of the public trust rights.”¹⁶⁴ The Court found that harvesting living rockweed is not protected by the public trust doctrine under either analysis.¹⁶⁵

The majority first analyzed harvesting living rockweed under the specific “navigation” and “fishing” prongs of the public trust doctrine “Trilogy.”¹⁶⁶ They held that “even when those terms are interpreted in a ‘sympathetically broad and generous’ way” harvesting living rockweed is not “navigation” or “fishing.”¹⁶⁷ Although through the use of boats there is a transportation and thus

a navigational component to harvesting rockweed, . . . [that is the] secondary [purpose] to what Acadian seeks to do. . . . Rather . . . the principal purpose [is] . . . engaging in a different, nonnavigation activity, namely, cutting and taking significant portions of rockweed plants, [which are attached to] the intertidal substrate [of the intertidal land itself]. . . . Therefore, Acadian uses the intertidal waters not for “navigation” in its own right, but merely to gain access to the attached rockweed.¹⁶⁸

Thus, “harvesting living rockweed from the intertidal zone” is not “navigation.”¹⁶⁹

Although the Court has traditionally “viewed the concept of ‘fishing’ broadly,” in this case the parties stipulated that rockweed is a plant.¹⁷⁰ “Even, a ‘sympathetically generous and broad interpretation of the

162. *Id.* ¶ 2.

163. *Id.* ¶ 7.

164. *Id.* ¶¶ 8, 15, 20.

165. *Id.* ¶ 20.

166. *Id.* ¶¶ 21-27. The “Trilogy” refers to “fishing,” “fowling,” and “navigation” and Acadian Seaplants did not argue “fowling” in this case. *Id.* ¶ 21, n.7.

167. *Id.* ¶ 20 (citing *McGarvey v. Whittredge*, 2011 ME 97, ¶ 71, 28 A.3d 620).

168. *Id.* ¶ 22.

169. *Id.*

170. *Id.* ¶ 24-25.

public's rights' . . . cannot transform the harvesting of a marine plant into 'fishing.'"¹⁷¹ There are "fundamental dissimilarities between the harvesting of fish and of rockweed as a marine plant [that] demonstrate that Acadian [Seaplants] is not in the business of 'fishing.'"¹⁷²

The second public trust doctrine the majority analyzed was the application of the Common Law and a "Reasonable Balance" test.¹⁷³ This analysis was

explained by both Chief Justice Saufley in *McGarvey* and by the *Bell II* dissent, . . . [and] calls for an assessment of whether the removal of rockweed by members of the public from privately owned land is within the common law principle that looks to achieve a "reasonable balance" between the private landowner's interests and the rights held by the State in trust for the public's use of that land.¹⁷⁴

Even though this analysis factors in "contemporary notions of usage and public acceptance in order to strike a rational and fair balance between private ownership and public rights," that balance "must avoid placing any additional burden upon the shoreowner."¹⁷⁵ An additional burden can occur when "something is taken from the intertidal lands."¹⁷⁶ Here in *Ross*, the Court held that the "additional burden . . . [of] . . . cutting and removing marine plants from the intertidal zone . . . [was not reasonable when the harvesting was] . . . proximate to the dry sand on which the public has no independent rights, [and harvesting is done] with the use of specialized equipment and skiffs that have a multi-ton capacity."¹⁷⁷ Additionally, harvesting seaweed "is qualitatively similar to other uses [such as crossing land to cut ice and taking mussel-bed manure] . . . [where the Court has] held [those uses] are outside of the public trust doctrine."¹⁷⁸ Thus, the

171. *Id.* ¶ 26 (quoting *McGarvey v. Whittredge*, 2011 ME 97, ¶ 69, 28 A.3d 620) (citing *Cf. Moore v. Griffin*, 22 Me. 350, 356 (1843); *Marshall v. Walker*, 93 Me. 532, 537, 45 A. 497 (1900)).

172. *Id.* ¶ 27, n.10.

173. *Id.* ¶ 28

174. *Id.* (citing *see McGarvey*. 2011 ME 97, ¶¶ 41, 49, 57).

175. *Id.* ¶ 30 (quoting "*Bell II*" *Bell v. Town of Wells*, 557 A.2d at 188-89).

176. *Id.* (citing "*Bell II*" 557 A.2d 168, 188-89 (Me. 1989)).

177. *Id.* ¶ 31.

178. *Id.* (citing "*See, e.g., McFadden v. Haynes & DeWitt Ice Co.*, 86 Me. 319, 325, 29 A. 1068 (1894) (holding that although a person may pass over intertidal land to fish, that person may not enter that land for the purpose of cutting ice); *King v. Young*, 76 Me. 76, 80 (1884) (holding that the Colonial Ordinance does not permit taking mussel-bed manure from another's intertidal land); *Moore*, 22 Me. at 356 (same); *see also Feeney, supra* 44 at 341. ('[N]owhere in the body of

Court holds that, even when the public trust “rights are viewed from the broader of the perspectives explained in our case law,” harvesting rockweed is not a public right.¹⁷⁹

Ultimately, under either analysis the majority found that “rockweed attached to and growing in the intertidal zone is the private property of the adjacent upland landowner.”¹⁸⁰ The majority also declined “to consider the vitality of the holding in *Bell II*” because harvesting rockweed is not covered by either “view of the public’s right to use the intertidal zone.”¹⁸¹

Chief Justice Saufley, Justice Mead, and Justice Gorman issued a Concurrence because although they agreed with the majority’s result, they “would take this opportunity to explicitly overrule *Bell II*.”¹⁸² “Since [*Bell II*] . . . a member of the public has been allowed to stroll along the wet sands of Maine’s intertidal zone holding a gun or a fishing rod, but not holding the hand of a child.”¹⁸³ “[T]he Court’s limitation of the public’s allowable activities to those that can be forced into the definitions of “fishing, fowling, and navigation,”¹⁸⁴ has “generated significant and expensive litigation” and “bedeviled the State of Maine, . . . and we fear that the Court’s holding will become enshrined in increasingly uncorrectable law.”¹⁸⁵ Although there have been

judicial efforts to loosen the strings of *Bell II* . . . [those] anemic efforts have failed to do what must be done. . . . [and have left in place] jurisprudence that led to the tortuous shoehorning of various activities into the constrictive trilogy by declaring the simple walk of a scuba diver across the intertidal zone to the ocean as fitting into the definition of “navigation.”¹⁸⁶

Maine case law has fishing been held to include the collection of vegetable matter. Migratory resources (like fish, and presumably shellfish and worms) have traditionally been less protected by private property rights than stationary resources such as attached seaweed.’”) *Ross*, 45 ME 19, _A.3d_.

179. *Id.* ¶ 32.

180. *Id.* ¶ 33.

181. *Id.*

182. *Id.* ¶ 35, 43 (Saufley, C.J., Mead, J. & Gorman, J., concurring).

183. *Id.* ¶ 34 (Saufley, C.J., Mead, J. & Gorman, J., concurring).

184. *Id.* ¶ 37 (Saufley, C.J., Mead, J. & Gorman, J., concurring) (citing *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989)).

185. *Id.* ¶ 37 (Saufley, C.J., Mead, J. & Gorman, J., concurring).

186. *Id.* ¶ 39 (Saufley, C.J., Mead, J. & Gorman, J., concurring) (citing *McGarvey v. Whittredge*, 2011 ME 97, ¶¶ 72-77, 28 A.3d 620 (Levy, J., concurring)).

As time passes stare decisis may solidify this vital aspect of Maine law and

landowners understandably, may begin to rely on the restrictions placed on the public's access to the intertidal zone [and] . . . a literal reading of the Colonial Ordinance . . . which was actually no longer extant at the time of Maine's Statehood.¹⁸⁷

The 1989 decision in *Bell II* erroneously limited the public's reasonable and nonabusive use of the intertidal zone. That use should include the right to walk unfettered upon the wet sand of Maine beaches to peacefully enjoy one of the greatest gifts the State of Maine offers the world.

Simply put, we would overrule *Bell II* once and for all. We would adopt the original Wathen analysis, *Bell II*, 557 A.2d at 180-92 (Wathen, J., dissenting), and allow the common law of public access and use of the intertidal zone to continue to develop as it has over the centuries. The public deserves our correction.¹⁸⁸

Although the concurring justices would overrule *Bell II*, we would still hold that "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."¹⁸⁹

V. RAMIFICATIONS OF THE LAW COURT AFFIRMING THE SUPERIOR COURT'S HOLDING: BENEFITS AND ISSUES

A. Land Owners

Since the Law Court affirmed that rockweed is property of the upland property owner, property owners will be able to control and protect their intertidal property as they see fit. In Maine there is a "no-cut registry, . . . which is maintained by the Rockweed Coalition" and 568 property owners who did not want rockweed harvested from their property had previously

187. *Id.* ¶ 40 (Saufley, C.J., Mead, J. & Gorman, J., concurring) (citing *Moulton v. Moulton*, 309 A.2d 224, 228 (Me. 1973); *Jordan v. McKenzie*, 113 Me. 57, 59, 92 A. 995 (1915); see *McGarvey*, 2011 ME 97, ¶¶ 29-30, 28 A.3d 620 (Saufley, C.J., concurring); *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935 (Me. 1982).

188. *Id.* ¶¶ 41, 42 (Saufley, C.J., Mead, J. & Gorman, J., concurring).

189. *Id.* ¶ 43 (Saufley, C.J., Mead, J. & Gorman, J., concurring) (citing *see Bell II*, 557 A.2d at 180-81, 189).

signed up for the registry.¹⁹⁰ In fact, plaintiff Carl Ross forbade rockweed harvesting on his property and gave notice of that through the no cut registry.¹⁹¹ However, this did not prevent Acadian Seaplants from harvesting rockweed from the intertidal zone of plaintiff's property.¹⁹² Now because rockweed is legally deemed to be the upland owner's property, "[a]t least [land owners can] have their own influence on whatever happens, and control their own destiny as far as rockweed goes."¹⁹³

Many land trusts are also coastal property owners.¹⁹⁴ Sustainable conservation and wild life habitat protection is a key focus for these organizations.¹⁹⁵ Because rockweed seaweed is deemed to be the legal property of the upland owner, this will enable land trusts to help ensure that their missions are met and to manage rockweed on their properties sustainably.¹⁹⁶

Contrarily, the land trusts allege that if rockweed had been deemed to be public property, that would have hindered land trusts and other conservation organizations owning coastal property from following their conservation mission statements to the fullest extent.¹⁹⁷ Land trusts would only have been able to restrict rockweed harvest to what the DMR permitted in their area and no further.

B. Maine Economy

According to Jean-Paul Deveau, president of Acadian Seaplants, the Law Court's affirming this holding, could be "very detrimental to the marine plants industry in the state of Maine[.] . . . 'People need to understand the ramifications of this decision, with respect to the people earning a living harvesting marine plants.' Deveau believes that this case could create precedent for excluding other intertidal industries from harvesting on private property."¹⁹⁸ One other industry that could be

190. Sarah Craighead Dedmon, *Decision favoring landowners in rockweed case to be appealed*, THE QUODDY TIDES, March 24, 2017.

191. Jonathan Wood & Tate Watkins, *Solution to rockweed harvesting should be rooted in privacy rights*, Portland Press Herald, Nov. 16, 2017.

192. *Id.*

193. Dedmon, *supra* note 190 (quoting Carl Ross).

194. Brief of Amicus Curiae of Pleasant River Wildlife Foundation at 2-4, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142).

195. *See id.* at 1-5.

196. *See id.*

197. *Id.*

198. Dedmon, *supra* note 190 (quoting Jean-Paul Deveau).

affected is worming.¹⁹⁹ Wormers use rockweed seaweed to pack their worms.²⁰⁰ Therefore “there are 800 plus people with marine worming licenses who have a right to be very concerned about their access to this type of seaweed.”²⁰¹

Acadian Seaplants, Ltd., a Canadian company, gets “a substantial amount of [their] rockweed from Maine. [Deveau believes they would] still be able to operate, but [] think[s] companies in Maine could go out of business.”²⁰² “Among the Maine companies that also make rockweed products are Atlantic Labs, North American Kelp and Ocean Organics, all of Waldoboro.”²⁰³

On the other hand, in a brief of amicus curiae the Conservation Law Foundation²⁰⁴ argues that “beds of rockweed . . . provide habitat, shelter and feeding opportunities to dozens of commercially and ecologically important species of fish, invertebrates and birds, including American lobster, Atlantic cod, and blue mussels.”²⁰⁵ “Many species that rely on rockweed habitat are sensitive to habitat loss, and unsustainable commercial harvesting of rockweed [could] destabilize[] some of Maine’s most valuable fisheries.”²⁰⁶ Maine is well known for its seafood, especially its lobster cuisine.²⁰⁷ Therefore, because the sustainability of rockweed is crucial to many of Maine’s most important fisheries who are vital parts of

199. *Id.*

200. *Id.* (citing Georges Seaver).

201. *Id.* (quoting Georges Seaver).

202. Valigra, *supra* note 3 (quoting Jean-Paul Deveau).

203. Valigra, *supra* note 3.

204. In *Ross v. Acadian Seaplants, Ltd.*, the Conservation Law Foundation advocates for private property rights in the intertidal zone compared to in Massachusetts where they have advocated for public property rights. *Compare* Brief of Amicus Curiae for Conservation Law Foundation at 6, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142), with *Conservation Law Foundation Releases Guide to the Massachusetts Public Waterfront Act*:

Guide explains how residents can utilize coastal tidelands around the Commonwealth, CONSERVATION LAW FOUNDATION (Dec. 5, 2018), <https://www.clf.org/newsroom/conservation-law-foundation-releases-guide-to-the-massachusetts-public-waterfront-act/> [<https://perma.cc/GQQ6-EQT2>], and Kathleen Brill, *CLF Questions Secretary’s Chapter 91 Discretion*, CONSERVATION LAW FOUNDATION (Feb. 28, 2017) <https://www.lawandenvironment.com/2017/02/28/clf-questions-secretarys-chapter-91-discretion/> [<https://perma.cc/GXL3-BXNS>], and Complaint at 5, *Conservation Law Foundation v. Beaton* (Mass. 2017) (No. 1784CV00504).

205. Brief of Amicus Curiae for Conservation Law Foundation at 6, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142).

206. *Id.*

207. *Cuisine of New England*, WIKIPEDIA, https://en.wikipedia.org/wiki/Cuisine_of_New_England#Maine [<https://perma.cc/C5NS-TBML>].

Maine's economy, the Law Court's holding could have both positive environmental effects and positive economic effects.

C. *Environmental*

Rockweed seaweed beds are

a critical habitat for many of Maine's iconic marine resources, including juvenile lobsters and crabs, shellfish like mussels, clams and periwinkles, fish from cod to herring to flounder and seabirds such as eider ducks and osprey. At low tide . . . it provides a refuge from temperature extremes, light and predators. At high tide . . . it provides a complex canopy where fish feed and shelter from predators, water currents are slowed allowing larvae to settle, and juvenile lobsters, crabs and other crustaceans and shellfish can take shelter.²⁰⁸

As previously discussed, protection of rockweed beds could have positive effects on the economy involving harvesting of some of these organisms in addition to a basic environmental sustainability of these harvestable marine resources.

Environmental groups often argue for more governmental control over private property rights in the interest of protecting the environment. However, when it comes to rockweed seaweed, environmental groups argue that because the Law Court affirmed the Superior Court decision, it will "secure property rights[,] . . . mak[ing] it easier for property owners and environmentalists to protect rockweed and . . . encourage any harvesting to be sustainable."²⁰⁹ The amicus brief from the Pacific Legal Foundation and Property and Environment Research Center implied that now that rockweed is deemed a private property right, it will open the door for environmental groups to negotiate financial agreements with owners that result in benefits to the environment.²¹⁰ Although this is not a

208. Brief of Amicus Curiae for Conservation Law Foundation at 2, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142).

209. Tate Watkins, *Maine Rockweed Harvesting Dispute Underlines Importance of Property Rights*, PROPERTY AND ENVIRONMENT RESEARCH CENTER (Aug. 8, 2017) <https://www.perc.org/2017/08/08/maine-rockweed-harvesting-dispute-underlines-importance-of-property-rights/> [https://perma.cc/2BWJ-WSAE].

210. See Brief of Amici Curiae of Pacific Legal Foundation and Property and Environment Research Center, at 9 *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_ (No. WAS-17-142). (citing *Cf. DAVID D. HADDOCK, WHY INDIVIDUALS PROVIDE PUBLIC GOODS, IN ACCOUNTING FOR MOTHER NATURE* 261-85 (2008) http://www.hermesricerche.it/ita/semconv/WP_Haddock_1.pdf [https://perma.cc/TC72-ZHZZ]).

traditional “business” form of economy, this could still be another source of monetary input for Maine.

Seaweed can also play a crucial role in erosion prevention.²¹¹ In the mid-1980s in Long Beach, California, artificial seaweed was successfully used to minimize erosion of sand beaches.²¹²

VI. POTENTIAL SOLUTIONS TO PROMOTE SUSTAINABLE ROCKWEED HARVESTING THAT SUPPORT MAINE BOTH ENVIRONMENTALLY AND ECONOMICALLY

Maine is a state where its economy is intricately dependent on a healthy natural environment.²¹³ Therefore, when it comes to State policies, it is pertinent to attempt to strike a balance between a sustainable environment and a sustainable economy. Although not an easy feat, it is a worthy goal. When it comes to rockweed harvesting, there are a variety of options that attempt to strike a balance between property rights and harvesting’s effects on the environment and the economy.

A. *Previously Suggested Potential Solutions to Intertidal Zone Property Issues*

Orlando Delogu has previously suggested that the State of Maine can solve a variety of issues caused by the private ownership of the intertidal zone and dry sand areas by using its taxing, bonding, spending, and eminent domain powers to purchase intertidal and dry sand area zones for State ownership and public use.²¹⁴ More recently, Delogu has argued that the Moody Beach cases were inaccurately decided and should be overturned by the courts.²¹⁵ This would support reverting intertidal ownership to the State to hold in trust for the public.²¹⁶ However, to do so

211. See Judy Pasternak, *Artificial Seaweed Stems Erosion at Beach: Controversial Experiment Is Apparently Paying Off in Long Beach*, LOS ANGELES TIMES, April 27, 1985, <http://www.latimes.com/archives/la-xpm-1985-04-27-mn-12618-story.html> [<https://perma.cc/AC7J-NMQ3>].

212. *Id.*

213. *Protecting and Strengthening Maine's Environmental Protections*, MAINE PEOPLE'S ALLIANCE, <https://www.mainepeoplesalliance.org/content/protecting-and-strengthening-maines-environmental-protections> [<https://perma.cc/2MF2-KYPS>].

214. Delogu, *An Argument to the State of Maine* *supra* note 129, at 245, 276-77.

215. Delogue, MAINE'S BEACHES ARE PUBLIC PROPERTY *supra* note 133, at 15. See section IV(B) of this comment for further discussion of Delogu's arguments for overturning the Moody Beach cases.

216. *Id.*

could likely risk lawsuits claiming a judicial taking.²¹⁷ If the Court only overruled *Bell II* though, as the concurrence in *Ross* suggests, the risk of potential judicial takings lawsuits might be minimized.²¹⁸

B. Current Tax Policies: Overview, Application and Use as Guidelines for a New Tax Incentive Program

In order to encourage maintenance of some traditional land uses and sustainability, Maine has several tax policies that it uses to encourage specific uses of property through a reduction in property taxes to owners who meet specific use requirements. Current Maine tax policy plans could be used, revised, or utilized as a template for a new tax policy to provide incentives for sustainable rockweed seaweed harvesting. However, the precise way they could be utilized and their impact on Maine may hinge on the Law Court's holding that harvesting rockweed is not fishing. The current tax policies that will be evaluated for this purpose are the working waterfront plan, the farm and open space plan, and the tree growth plan. First, in the following sections, the Maine constitutional basis and current tax policy law will be discussed. Next, the current tax policies will be summarized and then evaluated as to how they would apply now that the Court has held rockweed harvesting is not fishing. Finally, potential revisions and uses as a template for a future Intertidal Vegetation Growth Management tax policy will be evaluated.

1. Maine Constitution's Basis for Tax Incentive Programs

The Maine Constitution's Article IX, subsection 8 addresses taxation and provides that "[a]ll taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."²¹⁹ Section 8 clause 2 is the basis for tax break incentives for properties such as working waterfront, farm and open space, and tree growth. It gives the Legislature the power to make laws that calculate a different reduced property tax based on the value of the lands

217. See ROBERT C. ELLICKSON, ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 281 (Wolters Kluwer Law & Business, 4th ed. 2013).

218. See *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶¶ 34-43, _A.3d_ (Saufley, C.J., Mead, J. & Gorman, J., concurring); ELLICKSON, *supra* note 217, at 281.

219. Me. Const. art. IX § 8.

current use for the following types of land:

- A. Farms and agricultural lands, timberlands and woodlands;
- B. Open space lands which are used for recreation or the enjoyment of scenic natural beauty;
- C. Lands used for game management or wildlife sanctuaries; and
- D. Waterfront land that is used for or that supports commercial Fishing activities.²²⁰

This section has been amended several times. Section A, B and C were added in a 1970 amendment.²²¹ Section D was added in November 2005 per a Maine voter referendum to amend this section in order to include working waterfront.²²²

2. Current Tax Incentive Programs Overview

a. Maine Coastal Plan/Working Waterfront Tax Law Overview

The purpose of Maine's working waterfront tax law is that it is in the public interest "to encourage the preservation of working waterfront land and to prevent the conversion of working waterfront land to other uses as the result of economic pressures" caused by high taxes on waterfront property.²²³ This plan reduces those high waterfront property taxes if the property qualifies as "working waterfront."²²⁴

"Working waterfront land" means a parcel of land, or a portion thereof, abutting water to the head of tide or land located in the intertidal zone that is used primarily or used predominantly to provide access to or support the conduct of commercial fishing activities."²²⁵ "Used primarily" means used more than 50% for commercial fishing activity."²²⁶ "Used

220. Me. Const. art. IX § 8 cls. 2.

221. L.D. 1121 (105th Legis. 1969); *Amendments to the Maine Constitution, 1820 – Present*, MAINE STATE LEGISLATURE LEGISLATIVE HISTORY COLLECTION, <http://legislature.maine.gov/lawlib/lldl/constitutionalamendments/index.html> [<https://perma.cc/NKX8-CN8E>] [hereinafter *Amendments to the Maine Constitution, 1820 – Present*].

222. L.D. 299 (122nd Legis. 2005); *Amendments to the Maine Constitution, 1820 – Present*, *supra* note 221; An Act To Preserve Maine's Working Waterfront Concept Draft Summary, L.D. 1972 (122nd Legis. 2006) http://www.mainelegislature.org/legis/bills/bills_122nd/billpdfs/LD197201.pdf [<https://perma.cc/9XLM-ZJLA>].

223. ME. REV. STAT. ANN. tit. 36, § 1131 (West 2010).

224. *Id.*

225. *Id.* § 1132(11).

226. *Id.* § 1132(10).

predominantly' means used more than 90% for commercial fishing activity, allowing for limited uses for noncommercial or nonfishing activities if those activities are minor and purely incidental to a property's predominant use."²²⁷

"'Commercial fishing activities' means commercial aquacultural production and commercial fishing," and excludes retail sale to the general public.²²⁸ "Commercial fishing" is further defined by Maine statute to include "harvesting . . . of wild marine organisms," including "animal[s] or plant[s] that inhabit[] intertidal zones or waters below head of tide."²²⁹

The current use valuation of working waterfront land is calculated per parcel by the assessor.²³⁰ This value can be calculated under either the comparative valuation or alternative valuation methods.²³¹

Under the comparative valuation method, the "current use value" for the assessed property value can be determined several ways: first, "[a]ll excess valuation factors that affect the land's just value;" second, the comparative value assessed on the basis of use for an inland commercial enterprise that has a similar "function, access and level of activity" as the working waterfront land does; and finally, by "[a]ny other factor that results in a determination of the current use value of the working waterfront land."²³²

If there is insufficient data to use the comparative valuation method, then the alternative valuation method can be used.²³³ The tax assessor may apply a specified percentage reduction to the "ordinary assessed value of the land."²³⁴ This percent reduction is determined by which of the following categories the land falls into.²³⁵ First, under section A if the "[w]orking waterfront land [is] used *predominantly* as working waterfront land [it] is eligible for a [twenty percent] reduction."²³⁶ Second, under paragraph B if the "[w]orking waterfront land [is] used *primarily* as working waterfront land [it] is eligible for a [ten percent] reduction."²³⁷ Finally, if the "[w]orking waterfront land . . . is permanently protected from a change in use through deeded restrictions [it] is eligible for the"

227. *Id.* § 1132(9).

228. *Id.* § 1132(3).

229. *Id.* § 1132(2), (7).

230. *Id.* § 1135

231. *Id.*

232. *Id.* § 1135(1).

233. *Id.* § 1135(2).

234. *Id.*

235. *Id.*

236. *Id.* § 1135(2) (emphasis added).

237. *Id.* § 1135(2) (emphasis added).

twenty percent reduction from paragraph A or the ten percent reduction from paragraph B as well as an additional thirty percent reduction.²³⁸ All of these reductions are “without regard to permanent protection restrictions.”²³⁹

b. Maine Farm and Open Space Tax Law Overview

The purpose of the Maine farm and open space tax law is to protect the public’s interest in a “a readily available source of food and farm products, . . . to conserve the State's natural resources, . . . and to provide for the welfare and happiness” of Maine residents.²⁴⁰ This is to be done by encouraging preservation of farmland and open space land through this tax law policy to prevent the conversion of these spaces “to more intensive uses as the result of economic pressures.”²⁴¹ This is done by reducing property taxes for qualifying properties.²⁴²

i. Maine Farmland/Agricultural Tax Law Overview

“Farmland” is considered any land that is at least five acres and the sales value of “agricultural products” produced by farming or agricultural activities on the property has contributed at least two thousand dollars per year to the farming income.²⁴³ This income criteria must be met in either one of the past two years or three of the past five years.²⁴⁴ “The farming or agricultural activity and income derived from that activity may be achieved by either the owner or a lessee of the land.”²⁴⁵ “Agricultural products” are defined by statute as

those **plants and animals** and their products that are **useful to humans** and includes, but is **not limited to, forages** and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, bees and bees' products, livestock and livestock products, manure and compost and fruits, berries, **vegetables, flowers, seeds, grasses and other similar products, or any other plant**, animal or plant or animal products that supply humans with

238. *Id.* § 1135(2).

239. *Id.*

240. ME. REV. STAT. ANN. tit. 36, § 1101 (West 2010 & Supp. 2018).

241. *Id.*

242. *Id.*

243. *Id.* § 1102(4).

244. *Id.*

245. *Id.*

food, feed, fiber or fur. "Agricultural products" **does not include trees grown and harvested for forest products.**" (emphasis added).²⁴⁶

For tax purposes the "current use value [(per acre)] of farmland used for agricultural or horticultural purposes" will be based on the current agricultural or horticultural use.²⁴⁷ It will not factor in market value for any other use/development, or any added value due to "road frontage or shore frontage"²⁴⁸

ii. Maine Open Space Tax Law Overview

Open space land is defined to be land that "the preservation or restriction of the use of . . . provides a public benefit in any of the following areas: A. Conserving scenic resources; B. Enhancing public recreation opportunities; C. Promoting game management; or D. Preserving wildlife or wildlife habitat."²⁴⁹

For open space land tax purposes "one of two methods can be used for valuation of . . . [the] land."²⁵⁰ First, the "current use value" is the estimated sale price if the land "were required to remain in the particular category or categories of open space land for which it qualifies under [this tax law and] . . . adjusted by [a] . . . certified ratio."²⁵¹ Second, if the first method is not feasible the alternative method of assessment may be used.²⁵² This alternative method reduces the "ordinary assessed valuation of the land" by a "cumulative percentage reduction," which is based off of what category the land falls in.²⁵³ Categories of land that are eligible for additional percentage reduction include: permanently protected open space, forever wild open space, public access open space, and managed forest open space.²⁵⁴ The "cumulative percentage reduction" can range from 20% to 95%.²⁵⁵ All open space land is eligible for the minimum percentage reduction.²⁵⁶ The maximum "cumulative percentage" can be achieved for land that is "permanently protected open space," "forever

246. ME. REV. STAT. ANN. tit. 7, §152(2) (West 2018).

247. ME. REV. STAT. ANN. tit. 36, § 1105 (West 2010 & Supp. 2018).

248. *Id.*

249. *Id.* § 1102(6).

250. *Id.* § 1106-A.

251. *Id.* § 1106-A(1).

252. *Id.* § 1106-A(2).

253. *Id.*

254. *Id.* § 1106-A(3).

255. *See Id.* § 1106-A(2).

256. *Id.*

wild open space,” and “public access open space land.”²⁵⁷ “Managed forest open space land” is also eligible for high cumulative percentage reductions.²⁵⁸

c. Tree Growth Tax Law Overview

The purpose of Maine’s tree growth tax law is to protect the public interest “by encouraging forest landowners to retain and improve their holdings of forest lands . . . and to promote better forest management . . . in order to protect this unique economic and recreational resource.”²⁵⁹ To accomplish this, this tax law provides that “forest lands generally suitable for the planting, culture and continuous growth of forest products [be taxed] on the basis of their potential for annual wood production in accordance with the” provisions described below.²⁶⁰ The tax reduction rate shall be calculated yearly on a per acre value based on the “average annual net wood production rate for each forest type.”²⁶¹ Although this law will clearly not be applicable to seaweed, it can provide a useful guideline for potential future tax policies.

The land must be at least ten acres to qualify for the tree growth plan.²⁶² Although a qualified parcel of land may be used for multiple uses,²⁶³ its primary use must be “for growth of trees to be harvested for commercial use” and the owner must comply with the statutory requirements.²⁶⁴ The core requirements are: 1) have a forest management and harvest plan and update it every ten years; 2) every ten years, provide a forester’s statement that the property is in compliance with the plan; 3) if ownership of the property is transferred a statement that either a new forestry management plan has been enacted or that the new owner is following the previous owner’s plan must be provided; and 4) the owner must attest that the property is primarily used “to grow trees to be harvested for commercial use or that the forest land is land [covered under the exceptions].”²⁶⁵ Exceptions include public recreation, statutory or governmental restrictions, deed restrictions, or mineral exploration.²⁶⁶

257. *See id.*

258. *Id.*

259. *Id.* § 572.

260. *Id.*

261. ME. REV. STAT. ANN. tit. 36, §§ 576, 578 (West 2010 & Supp. 2018).

262. ME. REV. STAT. ANN. tit. 36, § 574-B (West 2010 & Supp. 2018).

263. *Id.* § 574-B(4).

264. *Id.* § 574-B.

265. *Id.* § 574-B (citing *Id.* § 573(3)(A)-(C), (E)).

266. *Id.*

If a portion of the land contains structures (other than those used for commercial harvesting purposes) that portion must be excluded from the tree growth property tax reduction. Regardless of building size, at least a half-acre will be excluded from the tree growth tax reduction.²⁶⁷ Additionally, property will be considered not “primarily used for the . . . growth of forest products” and thus become ineligible for the tree growth tax plan if the property is leased for recreational use and the value of that lease is greater than the value of sustainable harvesting of trees on the property²⁶⁸

There are also penalties for withdrawing land from tree growth unless the land is converted to farmland or open space land.²⁶⁹

3. *Implications of Rockweed Harvesting Not Being Fishing to Current Tax Policy Incentives: Applicability, Limits, and Potential for Revision*

Because the Law Court held that seaweed harvesting is not fishing, not protected by the public trust doctrine, and is the property of the upland owner, seaweed harvesters will have to obtain permission from the upland owners in order to harvest. This permission will likely occur through contracts with the upland owners, resulting in financial gain for that upland owner. However, whether the financial gain is enough of an incentive for the upland owner to allow harvesting remains to be seen. This will also require more coordination on the rockweed harvesters’ behalf. Incentives such as tax benefits could also provide additional incentives for the upland owner to permit seaweed harvesting on their property.

Although the holding that rockweed harvesting is not fishing will likely have a positive impact on the sustainability of rockweed, seaweed in general, and the coastal environment, it will create an extra burden on the seaweed harvesting industry. Maine is a state deeply connected to its coastal areas and marine economy. Maine is best known for its lobster industry, but despite recent peaks in lobster landings, that industry is expected to decline in coming years due to climate change in the Gulf of Maine.²⁷⁰ Maine will have to decide if it wants to support policies to continue to support the marine economy through the harvest of other

267. *Id.* § 574-C.

268. ME. REV. STAT. ANN. tit. 36, § 574-A (West 2010).

269. ME. REV. STAT. ANN. tit. 36, § 581 (West 2010 & Supp. 2018).

270. Penelope Overton, *Gulf of Maine lobster population past its peak, study says, and a big drop is due*, PORTLAND PRESS HERALD (Jan. 23, 2018) <https://www.pressherald.com/2018/01/22/lobster-boom-over-as-population-starts-to-decline/> [https://perma.cc/RR7V-H6YE].

organisms, such as seaweed. Based on the implementation of the working waterfront tax plan, it appears that residents in Maine are in favor of ensuring the survival of marine businesses in general. However, environmental protection is also something that is important to many Mainers,²⁷¹ and a balance should be struck between supporting the economy and preserving the environment.

a. Working Waterfront Tax Policy: Implications of Rockweed Harvesting Not Being Fishing

Because harvesting of rockweed was held to not be fishing, then use of the property for harvesting rockweed and likely any type of seaweed attached to the land might not qualify for a tax benefit under the working waterfront tax policy, as only “commercial fishing” activities qualify under Maine’s Constitution. However, because the statutory definition of “Commercial fishing” includes “harvesting . . . wild marine organisms,” including “plant[s] that inhabit[] intertidal zones,”²⁷² some may try to take advantage of this tax policy without realizing it may not be constitutional. If the constitutionality of this current statutory definition is not challenged, the working waterfront tax law as currently written could be used as a direct incentive for landowners to have their intertidal property be used for rockweed harvesting and get tax incentives to do so. This is because commercial rockweed harvesting could be considered a statutory “commercial fishing activity,” and thus any property used for that purpose would meet the basic type of use requirement for the statute.²⁷³

However, even if rockweed harvesting is allowed as statutory “commercial fishing activity,” the specific details for “used primarily” or “used predominantly” would still have to be met as well, and this could make it difficult for landowners to qualify for this tax break and problematic to ensuring that rockweed is harvested sustainably. This is because upland land uses will likely be the “primary” and “predominant” use of the property making it difficult to meet the fifty to ninety percent use criteria. Additionally, because of DMR cutting restrictions it is questionable as to whether it would be possible for a landowner to meet these use criteria. This would hinge on the overall property size, property

271. See ME DEP’T OF ENVTL. PROT., MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION US EPA PERFORMANCE PARTNERSHIP AGREEMENT FOR FFY 03-05 ENVIRONMENTAL PROTECTION DOCUMENTS 1 (2002).

272. ME. REV. STAT. ANN. tit. 36, § 1132(2), (7) (West 2010).

273. *Id.* § 1132.

dimensions (ratio of intertidal zone acreage and upland acreage), and what other property uses exist on the lot. Even if meeting these percentages is possible, if a landowner attempts to meet this criteria there is a risk that rockweed might be overharvested in order to attempt to meet the requirements of this tax benefit and have detrimental effects on the sustainability of rockweed. DMR cutting restrictions would be the main source in protecting overharvesting.

b. Farmland/Agricultural Tax Policy: Implications of Rockweed Harvesting Not Being Fishing

With the Law Court holding that harvesting rockweed is not fishing and that rockweed is the property of the upland owner, the landowner could possibly benefit from the Farmland/Agricultural tax benefit as the policy is currently written. Rockweed arguably could meet the definition of an agricultural product. This is because rockweed is a marine plant and could arguably meet the “plant” and “useful to humans” requirements.²⁷⁴ Although it is technically an algae it is often described as a plant or in plant like terms, and in fact is described so in the joint statement of facts in *Ross v. Acadian Seaplants, Ltd.*²⁷⁵ Although seaweed is not listed in the current examples of “agricultural products,” the list is “not limited” to those products listed.²⁷⁶ Additionally, it is not unheard of for governmental agricultural programs to be expanded for use in marine industries such as aquaculture.²⁷⁷ However, like farming, aquaculture traditionally is done in a more controlled environment whereas commercial fishing lacks the controlled environment.²⁷⁸ Because the Law Court did not discuss seaweed as analogous to a “tree” like the Superior Court did, and arguably it is not literally a tree, it would not be excluded under the agricultural products exclusion of “does not include trees grown and harvested for forest products.”²⁷⁹ Therefore there is a strong argument that rockweed could be considered an “agricultural product.”

274. See ME. REV. STAT. ANN. tit. 7, §152(2) (West 2018); *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 4, _A.3d_.

275. Appendix at 31, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, _A.3d_(No. WAS-17-142).

276. ME. REV. STAT. ANN. tit. 7, §152(2) (West 2018).

277. For an analysis on the prevalence of the Federal Crop Insurance Program in the aquaculture industry see generally Matthew H. Bowen, *Advancing the Aquaculture Industry Through the Federal Crop Insurance Program*, 24 OCEAN & COASTAL L.J. 59 (2019).

278. *Id.* at 74.

279. See ME. REV. STAT. ANN. tit. 7, § 152(2) (West 2018).

Although there is a strong argument that harvested seaweed should be considered “agricultural products,” there would also likely be opposition that “farmland” and “agricultural activities” were intended to refer only to terrestrial activities, and not extended further than controlled aquaculture. Additionally, even if the program were expanded to marine industries, there could be an argument that only aquaculture in its controlled environment should be comparable to agriculture.

If seaweed could be classified as an “agricultural product,” then the farmland portion of the farm and open space tax program could encourage shoreland landowners with property of more than “5 contiguous acres” and a profit for “agricultural products” of \$2,000 per year to either harvest rockweed themselves or contract with seaweed harvesters to harvest the rockweed on their intertidal property. This harvest would then be limited only by DMR regulations, any landowner’s contractual conditions, or property covenants. In the interest of balancing environmental needs and rockweed sustainability, while still supporting the rockweed business, it is advisable that this tax policy be revised to either 1) add additional requirements/harvest limitations to protect the environment and rockweed from overharvesting or 2) state that this policy does not include intertidal vegetation (including seaweed and algae) and create a separate tax policy to address intertidal vegetation.

*c. Open Space Tax Policy: Implications of Rockweed Harvesting
Not Being Fishing*

One could possibly argue that rockweed harvesting could fit under the open space tax incentive program as “[p]reserving wildlife or wildlife habitat”²⁸⁰ if harvesting is done sustainably. However, this argument is weak, and this subsection is more likely to work against rockweed businesses than for them. This provision would be more likely to support environmental conservation and that rockweed should not be harvested on lands in the open space program. Environmentalists would have a strong argument that harvesting rockweed is not “preserving wildlife or wildlife habitat”.²⁸¹

280. ME. REV. STAT. ANN. tit. 36, § 1102(6) (West 2010 & Supp. 2018).

281. *See id.* § 1102(6).

d. Tree Growth Tax Policy: Implications of Rockweed Harvesting Not Being Fishing

The Tree Growth Tax Policy would arguably not be applicable as rockweed seaweed is not a tree. However, it could be used as a template for a new Intertidal Vegetation Growth Management Tax Incentive Program.

4. Proposal for a New Intertidal Vegetation Growth Management Tax Incentive Program

Because the Law Court held that rockweed harvesting is not fishing and is the property of the upland owner, then Maine may best benefit from a new tax incentive program that balances incentives for all types of seaweed harvesting with environmental concerns and creates incentives for sustainable seaweed industries. This would provide both support for the seaweed harvesting industry while providing some environmental protection for seaweed and Maine's coast. If a program such as this is implemented then the working waterfront and farmland/agricultural tax policies should be modified to exclude the harvest of seaweed and other intertidal vegetation as it would be covered under this plan. Maine's tree growth management program provides the most appropriate template to follow for such a program. As with the forest management and harvest plan requirement in the tree growth program, a similar plan for an intertidal vegetation growth management and harvest plan could be developed for intertidal property that encourages sustainable harvesting of vegetation in the intertidal property if it is performed within an Intertidal Management and Harvest Plan. It is recommended that the language "Intertidal Vegetation Growth Management and Harvest Plan" be used and that the details of the plan specify that more plants, seaweed, algae, and vegetation than just rockweed seaweed are covered.

Similar to the oversight of the tree growth plan, this plan should require a marine biologist to develop and review the Intertidal Vegetation Growth Management and Harvest Plan and require commercial value use calculation at least every ten years and perhaps even every five years. A more frequent harvest time should be done because rockweed grows quicker than trees and this timing should be based on current scientific and environmental recommendations at the time of policy implementation. The plan would also need to be updated every five to ten years to reflect current scientific understanding and environmental developments. The plan should also include an environmental impact study on the marine and upland habitats (both property specific and local area). The requirements

of the Intertidal Vegetation Growth Management and Harvesting Plan would be in addition to the DMR's requirements. The DMR's requirements for Cobscook Bay already include annual harvest plans by harvesters.²⁸² Here the upland property owners would be required to have a plan specific to their property.

One area where this new plan should differ from the tree growth plan is that the acreage minimum should be smaller than ten acres as many shoreland properties are smaller than that. There should also be a minimum shorefront footage. However, there could also be some argument that the minimum shore frontage be as low as at least 100 feet in order to encourage landowners of smaller parcels to allow rockweed harvesting and have a cumulative effect on the commercial rockweed and other marine industries. If individually owned properties are less than five acres it would be recommended that they must work collectively with neighboring shoreland owners and require that there are at least five acres of continuous shoreland property in order for individual landowners to qualify for the plan. However, this would require collaboration among landowners of smaller shoreland parcels and could create problems with plan compliance through changes in property ownership.

It is recommended that this tax reduction plan can be used in combination with other tax incentive programs. This is in order to maximize the impact on Maine's marine economy and encourage more property owners to allow rockweed to be harvested from their property. Similar to the working waterfront plan, percent reduction could be tiered on percent use. This tax reduction should be no more than currently covered in the working waterfront plan and thus no more than a total of forty percent reduction. Although this tax policy would have many benefits it is unlikely many towns would be thrilled as it would reduce their tax revenue from valuable shoreland. Therefore, the actual percent tax reduction should be carefully calculated to be enough to provide incentives to landowners, but not too much to be drastically detrimental to Maine towns.

A tax incentive policy of this sort would provide landowners with the incentive to allow rockweed harvesting to occur on their property either through an easement or license. This would help support the Maine economy in maintaining current commercial uses of rockweed. The requirements for a growth management and harvesting plan would encourage sustainable harvesting and benefit the environment. It will also provide more free market opportunities for the owners to decide for

282. ME. DEP'T OF MARINE RES., *supra* note 21, at 30; ME. REV. STAT. ANN. tit. 12, § 6803-C(4)-(8) (West 2005 & Supp. 2018).

themselves how they want to balance rockweed harvesting with environmental conservation, while remaining in compliance with State harvesting regulations.

5. *Constitutional Requirements for a New Intertidal Vegetation Growth Management Tax Incentive Program*

Because the Maine Law Court affirmed *Ross v. Acadian Seaplants, Ltd.* on the rationale that harvesting of rockweed is not considered fishing, if the Maine Legislature desires to expand tax incentives, as previously suggested in this Comment, to include tax incentives for granting access rights to harvest rockweed or other marine vegetation, it will either have to rely on the working waterfront or farmland/agricultural basis in the Maine Constitution or should consider amending the State Constitution. According to the Maine Constitution Article IX, section 8, clause 2, taxation of lands based on current use can be done on “[w]aterfront land that is used for or that supports commercial fishing activities.”²⁸³ Although harvesting rockweed could currently statutorily be considered fishing, because the Law court held harvesting rockweed is not considered fishing, the Maine constitutional basis of this might be challenged. However, there is some argument that harvesting of rockweed falls under the “[f]arms and agricultural lands” constitutional clause.²⁸⁴ There are also counterarguments as to why harvesting seaweed should not fall under this category. Some of the property may fall under other tax incentive bases due to other uses, however those bases do not provide any specific incentives for allowing access to individuals or corporations to harvest rockweed seaweed. If the Legislature or Maine people do not feel confident in relying on the working waterfront or farmland/agricultural land portion of the Maine Constitution, then the Constitution should be amended.

Maine’s history of amending section 8 clause 2 of Article IX of the Maine Constitution²⁸⁵ provides support that this is a potential solution if the Maine Legislature or the Maine people via referendum deem this in the public interest.²⁸⁶ Given the historical commercial use of rockweed and other intertidal vegetation in a variety of businesses, it is highly likely it will be deemed in the public interest.

283. Me. Const. art. IX § 8(2)(D).

284. Me. Const. art. IX § 8(2)(A-C).

285. ME. REV. STAT. ANN. tit. 36, § 572 (West 2010 & Supp. 2018).

286. See Section VII(B)(1) of this Comment for a summary of Maine’s amendment history for Section 8 clause 2 of Article IX of the Maine Constitution.

VII. CONCLUSION

It is advised that the State review and revise its tax incentive policies to ensure they provide incentives that the State intends them to provide and that they promote sustainable rockweed harvesting and a healthy balance between Maine's marine economy and environmental interests.

Because the Law Court held that harvesting rockweed is not fishing, it is recommended that the agricultural/farmland tax policy be revised to either include parameters discussed in the new Intertidal Vegetation Growth Management Tax Incentive program or to exclude intertidal vegetation and implement a separate Intertidal Vegetation Growth Management Tax Incentive program.

If it is decided that marine activities cannot be included under working waterfront or agricultural/farmland uses, then it is recommended that the State amend section 8 (Taxation), clause 2 (Assessment of certain lands based on current use; penalty on change to higher use) of Article IX (General Provisions) of the Maine Constitution to include the harvest of intertidal vegetation in Maine's tax incentive programs and implement a new Intertidal Vegetation Growth Management Tax Incentive policy.

The State of Maine should consider revisions and potential additions to its use-based tax incentive policies in order to ensure a balance between economic interests and environmental sustainability.