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**50 Years of Environmental Law in Maine: A Long Look at the
Past—A Peek at the Future**

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In the Beginning there was:

Almost 50 years ago Maine's environmental movement was jolted into action by the ignominious featuring of the Androscoggin River on the cover of a national news magazine under a banner heading describing it as one of the 10 most polluted rivers in the country. The backup story indicated that it carried the population equivalent (a measure of pollution load) of over a million people—this at a time when the population of the entire state was not yet a million people. This was not the sort of factual reality and attention that a proud Maine people wanted or would long stand for. But new political winds were already blowing—winds that would make Maine forever more a two-party state, and that would bode well for the environment. A young legislator out of Rumford, Maine, Edmund S. Muskie, rose to become (and from 1954-58) served as Maine's Governor. Though little that could be characterized as modern environmental control legislation was passed at this early stage (1948-1958) Muskie and the Maine Legislature began the dialogue; a Water Improvement Commission was created; a groundwork for more effective pollution control was being laid. Ed Muskie, of course, went on to serve Maine in the United States Senate where for the next, over twenty years (1958-1980) his name became synonymous with environmental legislation—legislation for a nation and for his home state of Maine.

The Early Years:

In the early 60's the first significant appropriations to facilitate the work of the Water

Improvement Commission were authorized and in 1964 the state passed (and the electorate approved) the first of several bond issues (in the then unprecedented amount of \$25 million) for municipal waste water treatment plant construction. More importantly, the state had the courage to prefund the federal share of these treatment plants when federal appropriations fell behind the pace of construction. The feds eventually honored their commitment—Maine’s construction programs moved steadily forward, but there were several nervous years in which Maine laid out both its share and the federal share and waited patiently for reimbursement of the latter. We had indeed begun what was to become a long and costly battle that has not yet run its full course.

In the late 60's and through the early 70's, the rush of events from these modest beginnings was breathtaking; it is really the story of a relative handful of men and women, events and institutions that shaped an environmental blueprint and a legacy of concern for the environment that lasts to the present. We didn't always get it right, and we took a step backwards a time or two, but for the most part there is much to be proud of, and there is a good foundation to build upon as we move into a 21st century.

A second stirring of both alarm and hope was found in an unlikely place and was the product of an unlikely spokesperson. Bowdoin College was the setting, and John Mckee, a local photographer, became a voice that produced both angst and hope. His deftly mounted photographic exhibit “As Maine Goes” was proudly and prominently hung by the school’s Art Museum in the early fall of 1966. In large black and white photographs the despoliation of Maine was there for all to see; skillfully juxtaposed amid this tragedy McKee presented his counterpoint—equally large color photographs of Maine’s unsurpassing beauty. Artistically, the point was made—key questions were asked; what are we doing to ourselves? how long will it go on? In a forward to the Museum’s catalog of the exhibit, Justice William Douglas stridently

noted that: "...new standards are needed that control the relation and attitude of man toward the land, the air, the waters, and the life of this earth." These controls were not long in coming.

If more by way of incentive was needed, a string of one-time and on-going publications brought home the dangers of environmental harm, the degree of corporate excess in fostering that harm, and the timidity of all but a few of our political leaders in addressing these problems. In 1962, Rachel Carson (not a Mainer, but a person with ties to Maine) had published "Silent Spring" a book that documented the dangers of DDT and our penchant to misuse and overuse pesticides to our long-term detriment. Closer to home (and almost a decade later) a young lawyer, Richard Spencer, working with University of Maine law students, and under the auspices of Ralph Nader's Center for the Study of Responsive Law published "The Company State"; this volume documented not only the environmental harms wrought by Maine's pulp and paper industry, but the corporate and political power wielded by this industry group in an effort to maintain the status-quo. And finally, 1968 saw the beginning of a new weekly publication, The Maine Times. Peter Cox and John Cole were hands-on editors and publishers; they were also irreverent, committed to the environment, first-rate journalists, and relentless. They assembled a dedicated staff of like minded individuals and for the next decade and a half issue after issue examined the economic, environmental, and political life of the State in depth; a wealth of information, ideas, and good old fashioned muck-raking journalism poured out, all with an eye to protecting Maine's long-term quality of life that they saw as threatened. Few corporate or political leaders of the day were spared the sharpness of their analysis, or the sharpness of their journalistic tongue. The paper was simply "must" reading for those who feared the new (and growing) environmental movement, and those for whom it couldn't come fast enough.

A Burst of Environmental Legislation:

On the political/legislative front, the late 1960's found another young Maine Governor, Kenneth Curtis, in the right place at the right time. He had surrounded himself with a staff of bright and ambitious (in the best sense of the word) young men—Peter Bradford, Kermit Lipez, Andrew Nixon, Walter Corey to name just a few. Long before the first “Earth Day”, Maine’s legislative wheels were churning; a strengthened Water Pollution Control Act, and a new Air Pollution Control Act, both modeled after federal legislation addressing these issues, was passed in 1969. The old Water Improvement Commission was now the Water and Air Environmental Improvement Commission (a body that would subsequently become the Board of Environmental Protection), and a toughened approach to air emissions and waste water discharges that focused on the licensing of individual dischargers was in place.¹ A Maine Mining Conservation and Land Rehabilitation Act was passed in the same year,² as was An Act Revising the Law (significantly strengthening Maine’s provisions) Regulating the Alteration of Wetlands.³ A strengthened Pesticides Control Law was also put in place,⁴ and perhaps of greatest long-term significance, an

¹ Maine Laws of 1969, Chapters 474 and 499.

² Maine Laws of 1969, Chapter 472.

³ Maine Laws of 1969, Chapter 379.

⁴ Maine Laws of 1969, Chapter 480.

Act to create a Land Use Regulation Commission was also passed in 1969.⁵ The latter enactment, a tribute to the vision of many (but none more than Jim Haskell) has enabled the State of Maine to bring comprehensive planning, zoning-type regulation, and development controls to the increasing range of activities taking place on the state's nearly 10 million acres of unorganized territory (an area encompassing nearly ½ of the entire state). LURC activities today are undoubtedly more important than they were 35 years ago when this fledgling instrumentality was fashioned.

Maine's burst of legislative energy with respect to the environment both contributed to, and drew strength from the national momentum of the day. April 22, 1970 marked the first Earth Day and, as if to commemorate that event, Maine on May 9, 1970 passed two landmark pieces of legislation, the Site Regulation of Development Act, (enabling state-level review of major development activities) and an Act Relating to the Coastal Conveyance of Petroleum (enabling the state not only to regulate this hazardous undertaking but establishing a fund to compensate

⁵ Maine Laws of 1969, Chapter 494.

the state and third parties who may be damaged as a result of oil discharges).⁶ A year later the Maine Legislature became only the third state in the nation to put in place a Mandatory [Shoreland] Zoning and Subdivision Control Act (requiring comprehensive planning and the careful control of development in these fragile areas).⁷ Continuing to lead the nation, Maine was one of only a handful of states to pass a “bottle bill”; though few states have followed, we have shown this to be a viable strategy to control litter, reduce the volume of solid wastes, and bring a broad, a practical (citizen oriented) approach to recycling strategies.⁸

Administratively during this period Maine also resisted the pressures brought on by the first Arab oil embargo—get rich schemes, some by fly by night entrepreneurs, and some by major energy producers for oil refineries and oil storage facilities, were turned back in Portland, on Sears Island, and in Eastport. The penchant of Maine people to need to be convinced by hard data

before they accept schemes that look too good to be true, particularly when offered by people from “away”, stood the state and its environment in good stead. We were not as fortunate (or wise) with respect to Maine Yankee—the beguiling appeal of cheap energy and a home-grown company, CMP, led us to accept nuclear energy. We didn’t know what to do with the wastes then or now; the risks associated with the facility prompted us to close it earlier than it’s designed

⁶ Maine Laws of 1969, Chapters 571 and 572.

⁷ Maine Laws of 1971, Chapter 535.

⁸ Maine Laws of 1975, Chapter 739.

useful life would have allowed, but in heightened risk and in dollars we've paid a high price for our venturesomeness. And its not over yet.

Throughout this period, there were, of course, other (some would say lesser) pieces of environmental legislation, each dealing with some aspect of these highly inter-related issues: the Allagash has been protected; billboards were regulated; coastal zones (including offshore islands) began to be acquired and/or managed and regulated more carefully; ground waters and aquifers were more fully protected; energy conservation strategies were put in place; Land for Maine's Future began to be acquired; and state-level planning and land use control guidelines were fashioned. The point is amply made—these were extraordinary times, and in each of these areas of concern Maine men and women fashioned this vast array of law, lobbied each individual proposal through to enactment (sometimes in the face of powerful and opposed interest groups), and have for the most part seen to the successful implementation of these enactments over what is now a considerable period of time.

Two factors seem central to this achievement: the first is the fact that the protection of Maine's environment was never (and is not today) seen in partisan political terms. In the late 60's a democratic Governor Curtis (and his staff) worked readily with Horace (Hoddy) Hildreth Jr. and Harrison Richardson (two of the leading Republicans of the day) to fashion the legislative majorities needed for passage of many of the above noted measures. Second, grass-roots environmental organizations arose in Maine to carry the fight from every corner of the state to City Halls, Town meetings, and to the Legislative (and administrative) halls in Augusta—the Natural Resources Council of Maine, the Maine Audubon Society, Maine Coast Heritage Trust, Maine chapters of the Nature Conservancy, the Sierra Club, the Conservation Law Foundation, PIRG, (and many others) have all played a role. Perhaps most importantly, these organizations

(and a cadre of environmental lawyers they have spawned) have endured over the long haul—they endure today to protect the environmental legacy of our children.

Some Mistakes Were Made:

Before I am accused of seeing Maine’s environmental movement (and successes) through rose

colored glasses let me return to a point made earlier—some mistakes were indeed made and “we took a step backward a time or two”. Some of these mistakes are irretrievable—and we must live with the consequences of our bad judgment. As previously noted, the building of Maine Yankee is an example. But compounding this mistake (particularly as it relates to nuclear wastes) is the way we responded (“abdicated” may be more accurate) to federal legislation requiring states to find low-level nuclear waste disposal sites. Compact arrangements were encouraged and we initially expressed a willingness to join with New York and other New England states to find a suitable (least harms) site that would serve a six or seven state region. But while signaling our willingness to participate on one hand, we at the outset informed the other states in the region (our would-be compact partners) that if the best regional site turned out to be in Maine, we would

not accept it. How realistic is that—how fair? With such unbalanced ground rules, the other states quickly cut us loose, and as most here know, we wound up partnering with Vermont to send the low-level radioactive wastes of our two states (for a horrendous price) to Texas. In short, fearful of the very wastes we had created and benefitted from (through the operation of Maine Yankee) we struck a “Faustian” bargain to send our wastes to a poor, rural, largely Hispanic corner of Texas thought to be suitable for such disposal facilities. Time lags in this field being what they are, not a lot of money has been paid out to date, and Texas is rethinking its

position—but our approach to these issues was not our finest hour. And the problem (with low-

level, much less high-level, radioactive wastes) has not gone away. Thousands of spent fuel rods remain entombed over a fault zone in Wiscasset, Maine.

Another environmental mistake (or strategy, if you will) that is correctable, but may prove to be very difficult to change or correct, involves our penchant for going after major point sources first in an effort to reduce pollution loads by large measurable amounts. On one hand this makes sense—large corporate polluters have no right to pollute—their pollution loads can and should be reduced; moreover, they often have the resources to pay for required pollution control equipment.

But they do not represent the whole of the problem. In water pollution settings, for example, the major point sources represent no more than half the problem. The remaining pollution load comes from a thousand and one (nay tens of thousands) of camps and cottages, farm and forest activities, small businesses located in every nook and cranny of the state. Individually these pollutant loads are small, but in the aggregate they are half (in some settings more than half) of the problem—and we do little to insist that these pollution loads be responsibly dealt with. We “Grandfather” many of these pollutant loads. In short, we want a clean environment, but we are unwilling to impose burdens on ourselves, on people we perceive to be the “little guy”, even when it is clearly demonstrated that the aggregate of “little guy” pollution loads are a big part of the problem. One is reminded of the “Pogo” comic strip wherein he says: “I have seen the enemy, it is us.” We’ve got to begin changing here; “Grandfathering” for other than short (transition) periods of time must end, and all forms of non-point source pollution must be subject to meaningful regulations that are enforced.

An air pollution control equivalent of the above noted mistake involves our backing away from truck/automobile exhaust emission testing. Again, we vigorously pursue and license major instate (point source) emitters—and we should; we fruitlessly chase after (in the courts) Midwest

public utilities whose airborne wastes land on our doorstep; but we refuse to acknowledge that the literally hundreds of thousands of trucks and cars that ply the roads of Maine are a significant contributing factor to the quality of the air we breath. And worst of all, we had it right at one point— a truck/ automobile testing program that would have reached thousands of Maine citizens was in place; contracts between the state and testers had been entered into; the growing pains of start-up were being worked out. And then, as auto emissions testing became linked with air emissions trading strategies, we lost our will, and we lost our way. At the critical juncture, there was a failure of Gubernatorial, Legislative, DEP, and painfully, Natural Resources Council leadership. Faced with the possibility of a repealing referendum, the Legislature killed the testing program. Pogo redux.

Another mistake we continue to make is to over rely on “command and control” regulatory measures. Notwithstanding the success we have had with the “bottle bill” which relies on a small economic incentive to achieve a desired environmental objective, we quite irrationally resist the broader use of market (economic incentive) strategies to achieve environmental goals. Bear in mind, it’s not an either/or choice; other countries, other states see regulation and market strategies as complementary tools—so should we. Economic self-interest is a powerful motivational tool used in countless settings in our market economy—it can be and should be harnessed to facilitate achieving a broad range of environmental objectives. For example, air emission reduction credits (resisted by the NRC of Maine in the early 90's) are authorized by the 1990 Federal Clean Air Act and are bought, sold, and traded in many parts of the country in settings that induce many emitters to do far more than regulations alone would require; by allowing these emitters to profit from their willingness to exceed clean air standards, the ambient air is cleaner than it otherwise would be. In fact, there is almost no environmental problem for

which a market incentive strategy could not be developed—a strategy which, when combined with

regulation, would achieve the environmental goal more fully than either approach on its own.

Two unfortunate mistakes in the land use area (primarily affecting organized territories) have had, and continue to have, adverse environmental consequences. The first, involves the State's commencement and then abandonment of funding for the development (and updating) of municipal comprehensive plans. Nothing by way of rational land use control and environmental protection can be put in place without the over-arching data gathering and fashioning of policy that comprehensive plans and planning represent. Short-run state budgetary considerations led us

to a decision that has imposed long-run costs on many municipalities—costs in the form of poorly located development, higher than necessary infrastructure costs, and a wide variety of harms and/or environmental damage that must be remediated. Second, we succumbed somewhere in the 70's to the belief that large lot zoning would protect Maine's suburban and rural environment.

Two or three acre minimum lot sizes were idealized as part of “the good life”; and if this was good, five or ten acre lot sizes would be even better. How this view took hold and who is to blame is neither important or knowable at this point—what must be recognized is that this pattern of urban/suburban/rural growth is incorrect and inherently destructive of both village centers and the suburban/rural landscape we would preserve. We have come to characterize it as “sprawl” and we have begun (haltingly) to address it, but not all of our fellow citizens realize how damaging the past thirty years of large lot zoning has been. It has created an automobile dependency (that in turn creates another range of problems); it has imposed huge infrastructure costs on the society; it has been (and still is) environmentally harmful; and ultimately it destroys

the social fabric, the small town feel and sense of community that Maine and upper New

England

cities and towns have been about for over 200 years.

A last mistake of relatively recent origin was the failure of environmental organizations, key legislative and state agency personnel, and responsible voices in the forest products industry to come together to fashion a sound, a workable forest management/cutting practices compact that would see us well into the 21st century. Like too many cooks, too many egos seemed to get in our way, and an opportunity for compromise and consensus was lost. Maine forests will probably survive, but the fact is they are less well protected than they ought to be, particularly from the more rapacious within the forest products industry.

An Environmental Agenda and Some Goals for the First Part of the 21st Century:

Perhaps at the outset of this section one should state the obvious. Not all of the mistakes of the past need be continued. If some mistakes are irremediable, others are correctable. We can begin dealing with all forms of non-point source pollution (or put more broadly, all more diffused forms of environmental harm)—individual citizens must come to feel that they have a stake in Maine’s environmental future, that there are steps they can and should take (beyond just returning bottles) to protect that future; truck/auto emissions testing can be resumed; a range of market (economic incentive) strategies to address an ever widening range of environmental objectives can be fashioned; the state can begin playing a more positive role, a more equally shared role with municipalities in dealing with planning, land use control, ending sprawl—it can use its funding and regulatory powers to this end; and discussions with respect to a new forest management/cutting practices compact can be reopened with an eye to achieving in the near future the compromise that eluded us in the late 90’s.

In addition to the above steps, there is perhaps no more important task than simply to “endure”—to continue to foster the non-partisan atmosphere and approach to environmental

issues

that has characterized our (Maine's) environmental past; to incrementally improve the existing framework of environmental laws dealing with more or less traditional problems (air, water, solid wastes, land use, etc.), and, more importantly, to consistently enforce these laws day in and day out indefinitely into the future. There is a tendency to grow tired, particularly when big environmental quality leaps are no longer likely or possible. Succumbing to this tendency simply plays into the hands of those who would exploit and/or despoil the environment—they will take whatever we give them. In short, environmentalists in the 21st century must play a long and patient game.

Two or three relatively new issues and specific steps that seem worth pursuing include: First, the fashioning of some consensus with respect to a major state or national park in some part of the forested region of northern Maine. At present we seem of several minds on the idea and we are simultaneously pursuing several strategies that are not altogether consistent. For example, some want no park of any type at all; they urge no, or at most limited, public land acquisition in Maine's northern woods. Some are committed to a widened use of conservation easements as a way of precluding large scale development in this area while preserving both public access and traditional forest related activities— (millions of scarce public and private dollars have already been spent in pursuit of this strategy). Others see this approach as a costly and temporary solution—easements expire and leave the land in private hands, and restrictions may be interpreted ever more broadly over time to allow development activities we may not be altogether

comfortable with. These people would coordinate and increase public and private fee simple acquisition of unique and/or critical forested areas; these holdings would be permanent; they could become part of a loosely linked state (or federal) park system or they could focus on

expanding existing holdings such as Baxter State Park. As this short discussion suggests, there is much to talk about here—but the point being made is that those of us who call ourselves “environmentalists” seem very divided on the question of how to move forward in this area of concern. The character of northern Maine over the next 100 years, and beyond, turns on decisions that will be made in the next 5 or 10 ten years, perhaps less; we need to talk more pointedly with one another about these issues.

A second new initiative that seems worthy of our attention grows out of the Maine Supreme Judicial Court’s decisions in the so-called Moody Beach cases.⁹ In a nutshell public use rights in sand beach areas were interpreted very narrowly; the rights of upland owners (including the right to exclude the public from these beach areas) were interpreted broadly. The likelihood that federal law will overturn these holdings or that the Law Court will revisit these issues is remote to the point of non-existence. Consequently, I would reiterate a plea made almost a decade ago, i.e., that Maine, working with those towns that have sand beach areas and with public and private instrumentalities, set about the task of systematically acquiring all of these areas.¹⁰ Our own experts tell us there are only 35-40 miles of sand beach (in a state with over 3,000 miles of foreshore); the symbolic, tourist, and recreational value of publically owning (and providing adequate year-round access to) all of these sand beach areas seems incalculable. In my view we

⁹ See Bell v. Town of Wells, 510 A2d 509 (Me. 1986) and Bell v. Town of Wells, 557 A2d 168 (Me. 1989).

¹⁰ See Delogu, An Argument to the State of Maine, the Town of Wells, and Other Maine Towns Similarly Situated: Buy the Foreshore—Now, 45 Maine L. Rev. 243 (1993).

should commit ourselves to the task immediately.

Finally, in my “peek” into Maine’s environmental future, I cannot help but believe that it is only a matter of time (perhaps a relatively short period at that) before the next energy crisis is upon us. And we are no better prepared to deal with it today than we were in the early 70's. We love our trucks and SUV’s; we want the lights to go on with the flip of a switch; we want to be warm in winter and cool in summer. We don’t want regulations that would make gas guzzlers or multiple car ownership more costly; we don’t want nuclear power; wood stoves are unhealthy; wind farms and transmission lines are unsightly; fossil fuels or trash to energy are dirty and pose air emissions problems; dams block fish passage; solar energy is too costly; gas is too dangerous.

In short, unless “muddling through” can be called a policy, we have no energy policy to address the next energy crisis. Here again, I would urge that we begin to talk with one another; we may need to have several conversations. What energy source(s) (even if less than perfect) are we prepared to live with, support? What conservation steps should we insist upon now? What mass transportation alternatives—bike, bus, train should we subsidize now (even though less needed today) because they will be sorely needed at some point in the future? These are questions worthy of asking and answering; and it is the environmental community that should lead this discussion.

Conclusion:

I am certain there are events and people, legislative initiatives and administrative actions whose environmental significance I have failed to note in these brief remarks—I apologize. But enough has been said to underscore the point made at the outset: We have made progress; our air and waters are cleaner today than they were in 1960; we are thinking more carefully about development and the use of our land. In many environmental settings we have acted with

courage. But it is not over—in fact, it will never be over. There are mistakes that need correcting.

Second and third generation environmental problems and issues need to be confronted; the costs of acting responsibly will mount and need to be paid; those who would exploit the environment will not go away and must be faced down. These facts underscore the last point I would make—“environmentalism” is not something we do—and like baking a cake, its done. It is instead an ethic, an attitude, a way of life, an approach to working and living in a finite world; it is a way of enduring far into the future, rather than burning brightly and extinguishing ourselves in the technology and excesses of the moment. In my view, it is a worthy, a necessary undertaking for any or all of us.

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