

HARBOR MASTER AUTHORITY STUDY

Proposal by the
DEPARTMENT OF CONSERVATION
Bureau of Public Lands

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I. EXECUTIVE SUMMARY

In accordance with L.D. 2313, "AN ACT to Clarify the Authority of Harbor Masters" enacted by the 112th Legislature, this study examines the local and statewide issues raised by L.D. 2313 and makes recommendations including supporting legislation.

As directed in the above Act, the Department of Conservation, Bureau of Public Lands consulted with the organizations listed in the study order by holding two group and several individual meetings during the summer of 1986. In addition organizations have had the opportunity to review and comment on the following report.

Increasing development pressure along Maine's coast has created a need to review how limited harbor resources are allocated. This study addresses the priority system by which mooring privileges are assigned, and recommends existing priority systems be replaced by a system based on user groups regardless of municipal residency. This change will create equal opportunity for all residents of Maine in regard to mooring privileges on State-owned submerged land. Regardless of these growing demands on the resource, it is the recommendation of this study that local government is best suited to determine management needs, regulate the wise use of harbor resources and enforce appropriate ordinances. To this end, supporting legislation is proposed to reinstate such authority, as established in L.D. 2313 but scheduled for repeal on April 1, 1987.

In addition to these two major recommendations this study considers standardizing harbor management guidelines, differential fee systems, harbor master qualification and training requirements along with numerous housekeeping measures to modernize existing statutory language. Supporting legislation is presented on these issues.

II. INTRODUCTION

The coastline of Maine is experiencing rapid growth and development pressure. This development coupled with a general increase in recreational interest and boating has resulted in demands which exceed the availability of coastal resources in many locations. As a result of this increased pressure, mooring privileges within harbors have become a valuable limited resource.

Since 1954 municipalities have had the authority to regulate certain aspects of harbor management, including the appointment of a harbor master who is responsible for assigning mooring privileges. For years this system has been effective in assigning mooring privileges. In part, this success is directly related to the fact that the level of demand was within the availability of the resource, simply put -- there was enough to go around. This situation has changed in recent years and as waiting lists grow, allocation systems, authority and rights have been questioned.

Evidence of this growing pressure, the limited availability of the resource, and review of existing allocation system was recently demonstrated in Freeport. As a result of a marina's

dissatisfaction with the harbor master's decision on mooring assignments, the issue of rights and authority were considered in Superior Court. The judge's decision in this case left both the State and municipalities with serious concerns about the authority conveyed to municipalities by existing statutes (Title 38, Chapter 1, subchapter 1 - Harbor Master's). The opinion prepared by Justice Silsby in this case removed from the town any right to review decisions of the harbor master. Of greater significance, the opinion seriously questioned town authority to adopt a harbor ordinance. The degree of limitation on the town to adopt some type of harbor ordinance is dependent on how the opinion is interpreted. Even a conservative reading seriously undermines those issues which could be addressed in a harbor ordinance.

In response to the uncertainty created by the court case, the 112th Legislature passed emergency legislation, L.D. 2313 "An Act to Clarify the Authority of Harbor Masters". This legislation clarified municipal authority to regulate moorings as well as adopt the ordinances necessary to effectively carry out this responsibility. In addition the Legislature directed the Department of Conservation to conduct a study concerning all issues raised by the bill. This legislation contains a repeal provision, Section 4, stating "All sections of this Act shall be repealed on April 1, 1987" (see Appendix A). It is therefore imperative that replacement legislation be in place by April 1, 1987 to avoid chaos for the upcoming boating season.

Within the Department of Conservation, the Bureau of Public Lands has management responsibility for the State-owned submerged lands involved in harbor management and moorings. During the summer the Bureau held two meetings with those organizations named in the study order which were interested in participating. Numerous field visits and individual meetings were also conducted.

This report is submitted in accordance with L.D. 2313. All issues raised by participants are discussed and appropriate legislative recommendations are made.

III. ISSUES AND RECOMMENDATIONS

Identification of the issues raised by L.D. 2313 was undertaken in July 1986. Of the twelve organizations listed in the study order, the following ten chose to participate:

1. Department of Environmental Protection
2. Department of Marine Resources
3. Maine Municipal Association
4. Maine Harbor Masters Association
5. U.S. Army Corps of Engineers
6. U.S. Coast Guard
7. Maine Marine Industries Association
8. Maine Resources Advisory Council
9. Department of Attorney General
10. Private boating interest.

In addition to the above, Representative James Mitchell of Freeport and Herb Hartman, Director of Parks and Recreation were invited to attend meetings. Thornton Ring of Ring's Marine

Service represented private boating interests. Participants and the organization which they represent are listed in Appendix B.

As a result of the first group meeting a list of major issues and concerns was compiled for further consideration.

These issues are listed below:

1. Land ownership
2. Management Responsibility
3. Harbor Management Guidelines
4. Priority systems - mooring privileges
5. Differential fee systems
6. Conveyance of limited rights
7. Rental moorings
8. Harbor Masters
9. Other issues
 - A. Harbor boundaries - establishment
 - B. Moorings of convenience
 - C. Lake (freshwater) Authority

Following the first group meeting, individual meetings were held with most participants to further discuss each issue. A second group meeting was then held to continue discussion on the relevant issues and resolve differing opinions where possible. As a result of these various meetings, The Bureau presents the following information and its recommendation on each of the major issues raised.

1. Land Ownership. The submerged land involved in harbor management is owned and held in trust by the State of Maine. The inner ownership boundary of the coastal and tidal lands in Maine

is governed by provisions of the Colonial Ordinance 1641-7 of The Colony of Massachusetts Bay. This ordinance established the sovereign's ownership of the seashore starting at the low water mark or 100 rods (1650 feet) from mean high tide, whichever is less. The outer boundary of State-owned submerged lands is established by federal legislation, the Submerged Lands Act of 1953, which quit claimed to the State submerged lands within three geographical miles of the coastline. State rights in this land are subject to dominant federal navigational rights, and the U.S. Army Corps of Engineers expresses concerns with regard to these navigational rights as they relate to priority systems for assigning mooring privileges. These concerns will be discussed in the appropriate section (Priority Systems - Mooring Privileges).

2. Management Responsibility. Numerous governmental agencies, at the federal, State and local level, are involved in decisions regarding the use of submerged lands. On the federal level the U.S. Army Corps of Engineers issues permits for certain projects located in either the intertidal or submerged lands. Moorings are covered under a general blanket permit and therefore do not require Army Corps approval on an individual basis. Rental moorings are not covered under the general permit and therefore do require a Corps permit. At the State level the Department of Environmental Protection has responsibility in regard to environmental concerns and considers moorings for vessels less than 65 feet in length exempt from the Wetland Alteration Permit process.

The Bureau of Public Lands has primary management responsibility on submerged lands for the State. The authority to lease submerged land for permanent structures is established in Title 12 ss 558-A "Submerged Lands Act" (see Appendix C). Under this authority the Bureau may lease the "right to dredge, fill or erect permanent causeways, bridges, marinas, wharves, docks, pilings, moorings or other permanent structures on submerged and intertidal land owned by the State." "Permanent" means occupying submerged land owned by the State during 7 or more months during any one calendar year. In consideration of the DEP exempt status and municipal involvement and authority, the Bureau through rule-making has established the same exempt classification as DEP, for vessels less than 65 feet in length. This exempt status at the State and federal level places the actual management responsibilities for assigning mooring privileges at the local or municipal level. Municipal authority to carry out this responsibility is established in Title 38, Chap. 1, sub-Chap. 1 "Harbor Masters" (Appendix D) and more recently in L.D. 2313 "AN ACT to Clarify the Authority of Harbor Masters". The Act to Clarify amends section 1 of Title 38, Chapter 1. Under the original statute municipalities have the authority to establish channel boundary lines, assign portions of their harbors for anchorage and appoint harbor masters who shall assign mooring privileges. As amended, section 1 clarifies the relationship between the municipality and the harbor master, stating that the harbor master "shall be subject to all duties and liabilities of that office as prescribed by State law,

regulations adopted by the municipal officers and municipal ordinances." In addition the amendment establishes municipal authority to "prohibit a harbor master from making arrest or carrying a weapon."

Section 2 of The Act to Clarify became a new subsection of Title 38. This section, entitled Relation to Other Laws, further articulates the authority of municipalities to adopt harbor ordinances, going into considerable detail specifying the broad range of issues that may be addressed in such an ordinance with care taken not to limit issues that may be addressed. The second major portion of the section creates a provision requiring a municipal ordinance which addresses the assignment of mooring privileges to provide and reserve a minimum number of moorings for non-residents not less than 10% of the number provided for residents.

Sections 3 and 4 of The Act to Clarify establish the study order and repeal provisions respectively.

Recommendation: Local government is best suited to determine management needs, regulate the wise use of harbor resources and enforce appropriate ordinances. It is both the position of the Department and the consensus of the study group that municipalities should continue to have management authority for general harbor management including the allocation of mooring privileges. This will require legislation to replace sections 1 and 2 of The Act to Clarify as they will be repealed in April, 1987. Proposed modifications to the assignment priority system established in section 2 of The Act to Clarify will be addressed

in the upcoming section of this report (Priority System - Mooring Privileges).

3. Harbor Management Guidelines. Currently there are no State Harbor Management Guidelines other than applicable section of Title 38 "Harbor Masters". The lack of such standard State guidelines creates some concern on the part of harbor masters and others that the boating public cannot be assured of consistent rules and regulations of any particular harbor.

At the State level, the current efforts by the State Planning Office to develop Coastal Policy Guidelines will establish State guidelines and priorities for some aspects of harbor management. At the local level many municipalities have independently developed harbor ordinances to establish rules.

The need for State Harbor Management Guidelines was discussed and there is some support among group members for their development. Such guidelines would attempt to create standard harbor rules and regulations where possible, allowing boaters the benefit of knowing what to expect and how to operate in Maine harbors. In addition such guidelines would lay the ground work and provide guidance for the development of municipal harbor ordinances.

While this concept seems reasonable, there are problems. Any such State Guidelines would have to maintain a large degree of flexibility to accommodate actual local needs. This need for flexibility would limit the degree to which guidelines could be specific.

The establishment of such State guidelines would necessitate the creation of a review process by which municipal ordinances are reviewed and approved as meeting the State guidelines. Much concern was expressed by the Harbor Masters Association and Maine Municipal Association in regard to the value of such an effort and they question whether the potential improvements would be far out weighed by an additional layer of paperwork and bureaucracy.

Recommendation: Where it is possible to standardize certain aspects of harbor management on a Statewide basis, such issues should be addressed through legislation. A primary example would be the establishment of a standard priority system for assigning mooring privileges. On other issues where a large degree of flexibility is required, organizations such as MMA, MHA, State Planning Office, University of Maine Extension Service and the Bureau of Public Lands should work together to develop informational material. This type of material would be available to municipalities to aid in their efforts in dealing with harbor management issues but would not establish mandatory standards requiring compliance. As an example, an informational pamphlet on how to develop effective harbor ordinances would be useful to many communities.

4. Priority Systems - Mooring Privileges. Existing statutes establish certain priorities when mooring privileges are being assigned by harbor masters. Title 38, Chapter 3 establishes the priority of "individuals who own the shore rights or have an interest in the same" and directs the harbor master to "locate suitable mooring privileges therefor for boat and

vessels..., fronting their land..." The Act to Clarify the Authority of Harbor Masters further establishes priorities in section 2 by stating "A municipal ordinance which addresses the assignment of mooring privileges must provide and reserve a minimum number of moorings for nonresidents which shall be a member not less than 10% of the number provided for residents".

Most municipalities operate under a system which establishes a priority for municipal residents above non-municipal residents. An example of such a system is presented below.

1. Resident shorefront owner requests for location immediately adjacent to frontage.
2. Resident commercial vessel owners.
3. Resident pleasure vessel owners.
4. Resident commercial operators with rental moorings.
5. Resident vessel owners with multiple locations.
6. Non-resident commercial vessel owners.
7. Non-resident pleasure vessel owners.

This system would have to be modified to meet the criteria established in the Act to Clarify.

It is the Department's position that the State resource involved, submerged land, should be available to all State residents on an equal opportunity basis. Existing priority systems which discriminate against non-municipal residents should be eliminated and replaced by a user group system establishing a priority for commercial vessels over pleasure boats. Upland owners should continue to have the privilege of a site adjacent to their shore property. The rights of individuals "who own the

shore rights or have an interest in the same" should be clarified. More specifically, are these rights transferable when one individual leases to another and what rights do individuals have in a joint ownership situation such as condominiums. A priority system based on user groups will allow the fisherman who resides in a community other than a coastal town, to have an equal opportunity to moor his vessel in a harbor close by.

Existing priority systems have worked well in the past because there were enough mooring sites to go around and, therefore, even if the non-resident fisherman was in the sixth priority category he still was assigned a mooring site. This is no longer the case as the number of requests for mooring privileges has started to surpass the availability.

Maine Municipal Association is not particularly supportive of the elimination of residential priority systems, being replaced by a user group approach. It is not difficult to understand this reluctance. Municipalities shoulder the burden of managing the harbor and pay for the expenses involved. However, there are methods to evenly distribute these costs among residents and non-residents which will be discussed in the following section "Differential Fee Systems".

On the other side of this issue is the U.S. Army Corps of Engineers. Army Corps of Engineers has similar concerns about priority systems which discriminate on the basis of residency as does the Department. Except, here, the concern is broadened to include all citizens of the United States, where the Department is primarily concerned with Maine citizens. In harbors where

Federal projects have been carried out in the past, municipal systems which establish priority based on residency, may violate equal opportunity terms of the agreement under which the project took place. Outside of federal project areas, the Corps' authority is tied to their responsibility to provide equal opportunity in the areas of navigation and commerce. Open to interpretation is the question of whether the availability of a mooring site is an integral part of one's ability to navigate. The Corps maintains that this is the case and that a system which discriminates against non-residents interferes with the rights of all to navigate.

The implications of a system that does not entirely meet Army Corps concerns should be considered. Eligibility for future federal projects may be sacrificed or the Corps could discontinue the general blanket permit and require a permit for each individual mooring thereby gaining control over who receives mooring privileges.

Recommendation: It is the Bureau's recommendation that mooring privileges should be assigned regardless of municipal residency and therefore priority systems which discriminate against non-municipal residents should not be allowed on State-owned property. Such systems should be replaced with user group systems which give priority to commercial vessels, and to those who have to be located on the water to make their living. Shore property owners should continue to have the privilege of a mooring site adjacent to their property.

In acknowledgment of the long standing nature of existing mooring assignments, and in an effort to create an orderly transition from the assignment system based on municipal residency to a new system based on user groups, existing assignments should continue and the new system should apply to vacated or new mooring sites only.

A standard definition of "commercial" vessels should be established legislatively.

5. Differential Fee System. Under a priority system for assigning mooring privileges based on user groups rather than municipal residency, there exists the possibility that a greater percentage of available moorings will be assigned to individuals who are not municipal residents and therefore do not contribute to the tax revenues of the community. Concern has been expressed that the costs of maintaining and running the harbor are paid by the municipality from this tax revenue and that individuals who do not contribute to these funds should not receive the benefits provided by these funds. An effective solution to this problem is the implementation of a differential fee system whereby non-residents are charged a fair amount comparable to the amount allocated from resident tax payments used for maintaining the harbor. In this manner non-residents pay their fair share of the costs incurred by the municipality and have an equal opportunity to be assigned mooring privileges.

The definition of municipal resident and State resident will have to be established. Resident status should probably be directly related to property ownership resulting in tax payments

rather than voting registration since an individual might own property and pay taxes in the municipality while maintaining a year-round residence and voting in another state.

Care should be taken when explaining the justification for the differential rates. The charge cannot be a payment in lieu of taxes but can be accepted on the basis that the resident will pay a lower rate in recognition of the previous payments made, part of which is used to support the management of the harbor.

Recommendation: A standard definition for municipal residency should be developed using property ownership or an interest in the same as a basis. Municipalities should be made aware of their authority to establish a differential fee system if the costs of managing the harbor are covered by tax revenues. It should not be necessary to establish this authority legislatively.

6. Conveyance of Limited Rights. As previously discussed, management responsibility and authority for the lands involved include federal, State and local government agencies. In an effort to clarify the authority of municipalities, consideration was given to the concept of the State conveying limited rights for locating moorings, in the form of a long-term lease to the town. A conveyance of this type would eliminate any remaining doubt concerning municipal authority for the area involved. It would also establish legal standing for moorings to occupy the area in relation to other future projects requiring use of the same area. Under their current status, a mooring could be displaced by another use if the proposed use received the

necessary regulatory permits and a lease from the Bureau of Public Lands.

While there appears to be some advantages to such a conveyance there are also drawbacks. This concept, as with standard harbor guidelines, would necessitate additional paperwork for municipalities as well as review and approval responsibilities for BPL. More importantly, such a conveyance would limit the Bureau's options when considering future projects; in essence the area would be dedicated for the purpose of moorings for the term of the conveyance. It is unlikely that future uses of submerged lands will displace significant numbers of moorings and their status as an existing use will be considered in any such decision. It does, however, seem prudent to maintain the option of being able to consider future projects.

Recommendation: Municipal authority should be clearly established through legislation making the conveyance of limited rights unnecessary. It is in the State's best interest to avoid this type of conveyance thereby maintaining its role to consider future projects located within mooring areas. To this end appropriate legislative language should be developed to clarify the Bureau's authority to consider future projects located within existing mooring areas.

7. Rental Moorings. Moorings that are maintained by an individual or business and made available to others on a rental basis for an amount in excess of the mooring permit fee are considered rental moorings. This type of mooring is not covered by the general blanket permit and the Army Corps, therefore, requires individual permits for such rental moorings.

On one hand there is the feeling that the State should receive a portion of the revenue generated from rental moorings, which are located on State property. On the other hand marina and boatyard operators claim that their rental charge is for the cost of owning and maintaining the tackle involved and is not a charge for occupying the site.

If the mooring permit has been issued to an individual who then chooses to pay another to own and maintain the tackle involved, additional fees seem inappropriate. If, however, numerous mooring sites have been assigned to one individual or business who then makes the sites available for rent, an additional fee for this privilege may be warranted.

Recommendations: If rental moorings are to be charged a fee above that paid by an individual, the fee should be retained by the municipality since they, rather than the State, incur the cost of managing the program.

8. Harbor Masters. Currently there are no qualification standards for harbor masters. This situation is of concern to both the Harbor Masters Association and private boating interest groups. In the past the duties and responsibilities of the harbor master may have allowed an individual with little pertinent experience to effectively handle the responsibilities of the position. As the job of harbor management has become more complex and demanding, the skills required have changed. To effectively carry out the duties and responsibilities assigned today, harbor masters need basic skills in many areas. Individuals appointed to the harbor master position should have

the basic skill required to carry out the duties of the position. Concurrent with the need for qualification standards is the need to establish training requirements.

Efforts are currently being made in both of these areas by the newly organized Maine Harbor Masters Association. This organization is the logical place for these issues to be dealt with and the State should await the outcome of these efforts before considering additional action in this regard.

There are a number of other issues which do require some attention by the State. As established in Title 38, the term of the position is currently one year. With increased responsibility, qualification standards and training requirements this should be increased to a two-year term to create a certain amount of stability and job security. Municipalities should obviously continue to have the ability to dismiss an individual for just cause. The Watercraft Excise Tax Study Committee has requested that the authority to enforce the excise tax law be specified in the Harbor Master statutes. It appears that harbor masters already have this authority under Title 12, Section 7056 "Other Law Enforcement Officers" and it is more a matter of the municipality making this a priority for the harbor master than the position lacking the authority to carry out the enforcement of the Excise Tax Law.

Subsection 5 of Title 38 "Removal of Vessels Obstructing Anchorage" establishes a charge of two dollars plus the cost of crew for removing a vessel which is obstructing anchorage. This fee appears to be the original rate established in 1954 and all study group members agree that it should be updated.

Currently section 2 "Rules for channel lines; enforcement" limits the harbor master to appointing one deputy. This limitation serves no known purpose and the actual area to be regulated by many harbor masters necessitates the appointment of more than one deputy.

Recommendation: Harbor master qualification standards and training requirements should be developed and enforced. The State should await the independent efforts being made by the Harbor Masters Association before considering any State action. The appointment for this position should be increased in section 1 "Appointment; compensation" to a two-year term. Changes should be made to section 5 to enable the harbor master to recover at least actual expenses incurred when removing vessels obstructing anchorage. Harbor masters should have the authority to appoint more than one deputy where necessary and therefore appropriate changes to section 2 should be made.

9. Other Issues. Many other issues have been raised through the course of this study. A number of these issues deserve consideration and are therefore presented under this miscellaneous category.

A. Harbor Boundaries. The question has been raised as to how municipalities have established the harbor boundaries within which the harbor master has authority.

Should all coastal waters within the town be covered under the authority of the harbor master? If not, who regulates mooring privileges outside of the harbor boundaries?