Public Submerged Lands Lease Fees Revised

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Most of the land in this State which is covered by water is owned by the State of Maine. The State Bureau of Public Lands is authorized to grant towns, non-profit organizations, individuals, and private for-profit entities leases or easements to specific parcels of underwater land and the water column above that land for a particular use. The basis for determining the fees to be paid by private users was amended in 1990, resulting in significant increases for some. This pamphlet summarizes the changes in the fee structure.¹

State Owns Submerged Lands

Deriving from legal doctrines with roots in Roman law and English common law, Maine law has historically recognized that the sea and tidally-influenced lands, by their nature, should be used in common by all. The State owns those underwater coastal lands from the mean low-water mark² seaward to the three-mile territorial limit. The State also owns the beds of tidal rivers below mean low-water, upstream to the farthest natural reaches of the tides; the land under ponds 10 acres or more in size (“Great Ponds”) below the natural mean low-water mark; and the river beds of rivers forming Maine’s boundary with Canada. These different types of lands are called submerged lands.

State to Manage Submerged Lands for Public Good

The State owns these lands “in trust” for the public and has a responsibility to manage them for the greatest long-term public benefit. The State has recognized that, in some cases, it is appropriate to grant entities other than the State the right to use submerged lands for specified time periods for

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purposes that will promote public use. For example, instead of keeping all submerged lands undeveloped for anybody to use on a temporary basis, the State believes it is in the public interest to allow specific applicants permission to build permanent structures (such as piers, wharfs, and marinas) for commercial purposes. It believes this is one way to encourage local governments or private individuals to construct the infrastructure which will allow the public to make greater use of water-related resources.

1975 and 1981 Acts Narrowed State Control, Authorized Leases

The Submerged Lands Act, adopted in 1975, gave the Bureau of Public Lands (BPL) of the Department of Conservation the authority to lease interests in submerged lands. However, the State imposed two major limits on its own jurisdiction.

First, under the Submerged Lands Act, structures which already existed on or over submerged lands as of October 1, 1975 were given permission to remain until September 30, 2005 without the owner having to enter into any lease agreement or pay any rent. The Act granted each owner a thirty-year "constructive easement." This easement is, however, only good for the particular use in existence on that date. A proposed significant change in the nature, intensity, or location of the use requires a new lease or easement.

The second limitation, effective in 1981, occurred when the State released to the upland owner all of the State’s interest in lands which were historically submerged or intertidal lands but which had been filled prior to October 1, 1975 (with or without governmental permission). These former intertidal or submerged lands became private lands, free of any public easement or public trust restrictions.

As a result of these two exceptions, the BPL only charges lease fees for uses which commenced after October 1, 1975 on lands that were not filled prior to that date, or for projects involving a significant change in a pre-October 1, 1975 use. In 2005, when the constructive easements allowing more than half of the current submerged lands uses expire, those uses will also be required to pay fees in accordance with the BPL fee schedule.

Evolution of Lease Fees

In the 1975 Submerged Lands Act, lease fees were set at $.01 per square foot per year, regardless of proposed use or location within the state. Two years later, fees were increased to a flat rate of $.03 per square foot per year. In 1984, lease fees were once again amended; that fee structure distinguished between the type of applicant and proposed use of the submerged lands. Generally, the 1984 annual base rates were: municipal facilities, no charge; commercial fishing and related uses, $.01 per square foot; other water associated or water-dependent uses, $.02 per square foot; and uplands uses (such as offices, parking lots, and restaurants) and filling of submerged lands, $.04 per square foot.

1988 Study Committee Recommendations

After the 1984 amendments, the BPL received a growing number of lease applications for increasingly complex issues such as residential condominiums, office complexes, and dockominiums (boat slips to be sold to individual owners). In response, the Legislature amended the Submerged Lands Act in 1988 to place a temporary ban on dockominiums, to clarify the BPL’s authority to turn down leases that would unreasonably interfere with commercial fishing and navigation, and to establish a study committee to review several issues, including the fee schedule.

The study committee recommended modification of the fee schedule to more clearly favor
commercial water dependent uses and to yield fair compensation to the public. The value of land varies greatly along the coast. The committee decided that the fees charged should reflect that variance in value. But instead of requiring an appraisal to determine the value of each proposed lease site, the committee recommended that the Bureau accept the municipality’s assessed fair market value of the adjacent upland as an approximation of the value of the submerged lands. The committee recommended that the adjacent upland value be adjusted to reflect the proposed use of the site, with the submerged land deemed to be worth 10% of the upland value if the submerged land was in commercial fisheries use, 20% if in other water dependent uses, and 100% (or no reduction) if in an upland use. The committee then divided this adjusted fair market value figure by 10 to convert it to an annual rental fee.

For example, if the assessed fair market value of a 20,000 square foot shorefront lot is $20,000 ($1.00 per square foot), the adjacent submerged lands will be valued at $.10 per square foot for commercial fisheries uses, $.20 for other water dependent uses, and $1.00 for upland uses. This translates to an annual rental fee of one-tenth of that amount — $.01 per square foot of submerged land to be leased for commercial fisheries uses, $.02 per square foot for other water dependent uses, and $.10 per square foot for upland uses. The rental fee would vary for other locations, depending on the per-square-foot assessed value of the adjacent uplands.

The current annual rental rates per square foot are:

- **non-profit organizations or publicly owned facilities** offering free public use or charging only a nominal user fee, **no rental fee**;

- **commercial uses of renewable aquatic resources** (including facilities directly involved in commercial fishing activities and marinas with at least 50% of the slips in use by commercial fishing boats year round, 1% of the municipally-assessed value per square foot for the adjacent upland);

- **other water dependent commerce, industry or private uses**, including those uses that cannot reasonably be located on an upland site or which are essential to the operation of the marine industry and marinas with less than 50% of the slips in use by commercial fishing boats, 2% of the municipally-assessed value per square foot for the adjacent upland; and

- **upland uses** (uses which can operate away from the waterfront and which are not essential to the operation of the marine industry) and fill, 10% of the municipally-assessed value per square foot of the adjacent upland.

**Recommendations Enacted 1990**

The Legislature enacted amendments to the fee schedule, effective April 20, 1990, which were consistent with the study committee’s recommendations.
The intent of these new regulations is to increase lease fees to the point where private users are paying fair market rental value, the public is receiving closer to full compensation for private use of public resources, and there is sufficient program income to support appropriate management of the State owned submerged lands.

For Further Information

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Endnotes

1. There are many related issues such as grounds for lease denial, mitigation, and consultation with local officials also raised by the 1990 amendments, but beyond the scope of this pamphlet.

2. In extensive intertidal flats, State ownership starts 1650 feet seaward of the mean high water mark if that is above the mean low water mark.

3. 12 M.R.S.A. § 558, repealed and replaced by § 558-A effective July 1, 1984.

4. However, leases for aquaculture are administered by the Department of Marine Resources and leases for mining are administered by the Maine Geological Survey.

5. No inventory has been completed, but it is estimated that there are in excess of 1,500 structures in this category.


7. The law provides for two kinds of conveyances: leases and easements. The fees for easements are a $50.00 processing fee plus a $25.00 registration fee every five years. Easements may only be granted for charitable purposes, or for permanent structures of less than 500 square feet for any purpose or less than 2000 square feet for commercial fishing activities. All other or larger uses require a lease. Upon determination, some constructive easements may qualify for treatment as an easement rather than a lease. 12 M.R.S.A. § 558-A.