DMR ADVISORY COUNCIL MEETING
December 8, 2004, 1:00 p.m.
Minutes

A meeting of the Department of Marine Resources' (DMR) Advisory Council (AC) was held on this date at the Department of Human Services Central Offices Conference Room, 442 Civic Center Drive, Augusta. AC members attending this meeting included **Dana Rice, Sr. - Chair, David Turner - Vice Chair, Blair Pyne, Al West, Ralph Smith, Larry Knapp, Mike Danforth, Dana Temple, Bill Sutter, Scott Tilton and Craig Pendleton.** Council members **Rod Mitchell, David Pecci and Allyson Jordan** were unable to attend. Department staff included Deputy Commissioner David Etnier, Col. John Fessenden, Deirdre Gilbert, Terry Stockwell, Samantha Horn Olsen, Mary Costigan, David Libby and L. Churchill. Other attendees included Susan Jones (Commercial Fisheries News), Sebastian Belle (Maine Aquaculture Association).

1. Welcome

Chair Dana Rice called for a round of introductions by members and staff. Next the Chair asked for volunteers to serve on the nominating committee for officers in 2005. Copies of the membership list were handed out as several members will term out during 2005. Volunteers are:
Al West, Dana Temple, Blair Pyne and Dana Rice.

2. Approval of minutes (Handout)

Motion: *(B. Pyne, D. Turner) Motion to approve the minutes of the meeting held September 15, 2004 as written.* Discussion: None
Motion continued: *Unanimous to approve*

3. Regulations - Action (voting)

Chapter 25.90(D)(3) Swans Island Area Lobster Trap Regulation, Lost Tag Replacement
Terry Stockwell provided a brief history of the rulemaking. See handout.
Motion: *(B. Pyne, L. Knapp) Motion to accept the rulemaking for Chapter 25.90(D)(3) as written.*
Discussion: S. Tilton pointed out a spelling error; the word "event" was misspelled as "even" and will be corrected. L. Knapp, question about trap count.
Motion continued: *Unanimous to approve*

Chapter 5 Confidentiality of Fisheries Statistics
David Libby spoke briefly on the necessity for the rulemaking in conjunction with updates last year to the enabling statute in 12 MRSA §6173. Questions from members were discussed on who reports now; the status of Chapter 8 the Landings Program regulations; federal vessel trip reporting and duplication questions; future reporting becoming more comprehensive; funding of the landings program; L. Knapp described an example of data he said came from the Department that had not been kept confidential as the proposed regulations describe and department staff asked to look into this with him after the meeting; and an industry advisory committee meetings is being held tomorrow on the development of mandatory reporting requirements for both dealers and harvesters. See handout.
Motion: *(C. Pendleton, S. Tilton) Motion to accept the rulemaking for Chapter 5 as written.*
Discussion: none
Motion continued:
Affirmative votes (approved): Dana Rice, Sr., David Turner, Blair Pyne, Al West, Ralph Smith, Mike Danforth, Dana Temple, Bill Sutter, Scott Tilton and Craig Pendleton.
Abstention (non-affirmative): Larry Knapp
The motion passed by majority of affirmative votes.

Chapter 36.01(D)(2)(a) Herring Management Plan – Correction to Catch quota and effort restrictions exception

L. Churchill relayed a message from Dep. Comm. Lewis Flagg on this rulemaking. The proposal is for consistency with the management plan, see handout. Dep. Comm. Flagg indicated that the other New England states rules are consistent with the plan.

Motion: *(C. Pendleton, D. Turner) Motion to accept the rulemaking for Chapter 36.01(D)(2)(a) as written.*

Discussion: B. Sutter asked questions about poundage that was responded to by the Chair Dana Rice. L. Knapp discussed questions about by-catch with other members briefly.

Motion continued: *Unanimous to approve*

Chapter 2 Fees: Section 10 Application Requirements for Standard Leases, Section 43 Lease Rental Fee, Section 45 Lease Renewal and Section 60 Lease Transfer

Dep. Comm. David Etnier reviewed the history of the regulation's development, see handout. The Department is in full recognition of the opposition to the fee increases; know the negative comments. It is however surprising the number's of persons who didn't attend the hearings. This is a tough voting issue, which we don't intend to do very often. The development goes back to February and before then with the Aquaculture Task Force and the Legislature working on the Task Force bill. There were many negotiations that resulted in a compromise struck that resulted in the statutory fee caps. The increased caps replaced funding since 1992 by the Finfish Aquaculture Monitoring Program (FAMP) - now gone. Funding for one position runs out in 2005 plus one position on temporary funds that was previously funded by the FAMP fees. The other positions are funded by general funds or gas tax. The Department heard and considered the comments and within the fiscal and statutory constraints possible addresses. The new application fees have been stretched for applicants through a 3-year phase in period and the fees on research type lease *renewals* eliminated, which there are few of. In the basis statement the Department committed to continue to find ways to handle amendments for transfer fees to family members and simple ownership name changes. No one has proposed a legally correct solution for these types of changes yet. We need more knowledge in corporate law to address these issues. He was asked of it was suggested to tie the fees to size and responded that yes, back in February this was discussed with industry representatives who asked to keep it simple with the numbers proposed. Industry indicated it did not want a tiered system.

Motion: *(R. Smith, S. Tilton) Motion to reject the rulemaking for Chapter 2 on fees as written.*

Discussion: R. Smith opposed the rulemaking and described through questions ways to illustrate his opinion that bottom culture, such as his mussel leases, should not have the annual rental fee increased from $50 to $100 per acre per year. In his opinion his type of bottom culture of mussels uses only 6 inches of area off the sea floor and the rest may be navigated freely compared to suspended culture that he states excludes all other activity or in other words suspended culture uses a much larger volume of area than bottom culture. Dep. Comm. Etnier pointed out that leases with gear when fallowed or have open areas can be dragged whereas a bottom culture lease may never be dragged.

S. Tilton: I don't have exclusive use [on my suspended lease] but they put lobster traps on it; commercial diving is however prohibited.

R. Smith: The Aquaculture Task Force report stated that it did not consider bottom culture and the values reported for the shellfish industry was only 3 million per year versus $28 million for finfish. His increase would double to $9,000 per year rental fee plus other costs is not feasible; leaves no incentive for persons to go into bottom culture. The LPA and 2-acre experimental type leases just aren't large enough to develop this type of business. The transfer fees aren't affordable to family members.

Dep. Comm. Etnier in response to start up, the Department is supporting other funding options [through the DECD] and the fees have not been raised for the LPA license or experimental type lease for start ups.

R. Smith: The LPA and 2-acre experimental type leases just aren't large enough to develop this type of business. The transfer fees aren't affordable to family members.

D. Temple: Where would the funding come from if the applications aren't there?

Dep. Comm. Etnier: Had we thought back in February that the fee increases would have driven persons out of business we wouldn't have gone there. It is a catch 22, insufficient funds means a lack of personnel to process the applications. Without this we'd have to go back to the Legislature and we won't get general

funding for this. We don't have any other route. This [position] was funded by the finfish fees, which is gone due to court orders and other things.
L. Knapp: Don't understand the industry well enough but it appears the state is driving a natural resource business away and the eastern part of the state is starving. We should attach fees to non-commercial uses of wharves.
Dep. Comm. Etnier: There are no more general fund monies beyond what we now have. These funds are for one staff persons and equipment. The general fund and gas tax already pays most of the rest.
S. Tilton: When the finfish fees dried up we shifted from acreage to poundage?
Dep. Comm. Etnier: These are two separate fees. The old application fee was based on acreage size. The finfish monitoring fees were based on a penny per pound of whole weight harvested fish.
S. Tilton: Regarding the $100/acre/year rental fee, I can produce much more than $100/acre from suspended culture. This won't put me out of business.
D. Turner: Don't know the bottom culture side of the industry, but do know the finfish side and recognize the Department's issues. If this isn't done here we do not know what the Legislature may do. This was part of the Aquaculture Task Force process. Aquaculture needs to stimulate start ups, can't get a lobster license and many things have changed. It was a poor showing in Eastport for the hearings. The tax revenue Eastport drew from finfish aquaculture was substantial. It's not the fee; it is the fee on top of all the other issues for a new industry. Mistakes have been made, yes. However, one site was charged $40K in taxes last year. That industry will be extinct in Maine in 5 years. The environmental groups have driven costs up to drive the industry out. With the layoffs this is kicking them when they're down. The application is expensive for the applicant too. We went through this on the Task Force and then most environmental groups didn't show up to our meetings. I can't support this for different reasons from Ralph. Also, I do own a small portion of one finfish lease. In the Task Force committee there was a lot of give and take. More was given by the industry, which will be crushed in time.
B. Pyne: Disagree with D. Turner. On a much broader stroke, this applies to all businesses in Maine. Taxes, fees make it difficult to exist. Don't blame the Department. The problem is they're up against a wall and have to turn to the industry. I pay a lease fee of $900 to the Department of Conservation for 160' x 160'. The fee is based on a percentage of you're gross income and you have no representation for it. This is an overall trend. The money has to come from someplace and the problem lies with the Legislature. Increasing fees is not a way to promote industry and preserve working water front. This is not encouraging especially to those starting a small business.
Dep. Comm. Etnier: [responding to D. Turner and B. Pyne] Part of this is due to elimination of the FAMP fee, which in part was at the finfish industry's request that they could do better for less cost and the Department agreed. This is a shift from finfish to shellfish. As the amount of contentiousness increases this requires more staff time too. This is not raising a fee it is shifting it and has been done with the industry representatives back with the Legislature in February.
B. Sutter: The legislation allows differentiation between bottom and suspended; finfish worth $28 versus shellfish at $3 million in value; bottom can be navigated and lobster fished and suspended cannot be dragged; the one position's work has been taken over by Department of Agriculture.
Dep. Comm. Etnier: Department of Environmental Protection (DEP) not Agriculture.
S. Horn Olsen: Correction; The DEP requires the Department's staff technical expertise therefore workload has stayed the same within the Department. The difference now is that the responsibility to enforce the monitoring is now with the DEP, not the department (DMR). The costs are now paid by the industry directly to contractor(s) instead of the Department administering the fee to a contractor to do the monitoring.
B. Sutter: Explain (?)
S. Horn Olsen: The fee caps were set at a specific amount. For fair play we agreed to set caps without changes so there would not be increases in the foreseeable future.
B. Sutter: What is the back up plan if there is no funding?
Dep. Comm. Etnier: Everything is back on the table. The constraints (caps) in the fees would have to be amended. There won't be any general funds.
C. Pendleton: Can you revert to the penny per pound finfish fee?
Dep. Comm. Etnier: No, that fund is gone [eliminated in the statutes].
S. Horn Olsen: When the Legislature repealed the FAMP penny per pound finfish fee and authorized these fees they were done as a package and this is the follow-up.

A. West: The rules don't recognize bottom culture using a greater amount of space for a lowest value product versus high value product in finfish. Consider a sliding scale. The staff persons must spend far less time on bottom mussel culture than a more active suspended culture site.
S. Tilton: Don't want to divide the bottom and suspended culture; however I may be able to raise more value on a small area. It is expensive either way. This proposal keeps the Department's capability to monitor and regulate in place that is necessary. The $100 per acre annual rental fee seems a viable price for aquaculture. The shellfish industry has been asked to step up to the plate for a fee that was previously funded by finfish aquaculture.
R. Smith: The $90K budget based on the annual rental fee is an inflationary increase of 50% when the staff has less work now because it is done by the DEP.
S. Horn Olsen: The first $50 of the $100 annual per acreage rental fee goes to the general fund and always has. The 2nd $50 proposed increase would go to fund the one staff position. Regarding workload changes the DEP's workload on new permits is now more complex and the DMR staff is therefore still doing the video reviews for the DEP and thus is not a decrease in DMR workload. The only decrease is that the administration of contracting the monitoring work changed from the DMR to the industry, not DEP. The review of data continues as it was done before by DMR staff. Since there are many overlapping issues it is not possible to say how much time is spent on finfish and shellfish now with a lot of research initiatives going on in both sectors.
B. Pyne: Explain the rationale on the transfer fees.
S. Horn Olsen: These are new; recommended by the Task Force but with no amount. We are charged to take into account name changes, family transfers versus selling and the Department is committed to doing this at a later time once we figure out how to do this; if this goes back to the Legislature the industry will take a bigger hit.
[?] If passed, how do we make sure transfer fee issues will be addressed?
Dep. Comm. Etnier: You have my word.
B. Sutter: In Maine law "corporate" is an individual. He described examples of inequities in corporate law.
R. Smith: On page 180 of the Task Force report they wrote the desire for a reasonable tiered system. Who opposed this? Research got $214 million through the University last year. Leaseholders could manipulate the system to get the [renewal] fee exemption. The bottom culture annual fees are too high and the Department shouldn't be allowed to put an industry out of business for funding. The transfer fees are too high.
D. Temple: On the transfer fees, having done a lot of investments I can't imagine it being able to do it for less than $5K.
B. Sutter repeated the question as to what happens without this, what is the back-up plan?
Dep. Comm. Etnier: The proposed regulations were amended based on the comments through the 3-year phase-in of application fees and exemption for the renewal fees for research type leases. There is no back up plan; our hands are tied by the caps in the statutes; without legislation to amend this is the maximum we can do except going back to the Legislature.
S. Tilton: The transfer and renewal fees were added instead of charging, for example, $200 per acre for the annual rental fee.
D. Rice: Does the program continue or shut down?
Dep. Comm. Etnier: We would have to go back to the Legislature if this fails and ask again. The proposed fees go back to the discussions in February when the cash flow stopped from the FAMP fees being discontinued then.
R. Smith: Why not go back to the Legislature?
Dep. Comm. Etnier: We're at the caps given to us by the Legislature now. There is no place else to go.
R. Smith: Yes, we do because the fees are inflated by more than what is needed.
S. Horn Olsen: We do not receive the first $50 of the $100 per acre fee and never have.
B. Pyne: How much tweaking can be done if passed?
Dep. Comm. Etnier: We're at the maximums now. We cannot charge the finfish fee by law now. We can assess a shellfish landing fee.
S. Tilton: This would translate to a higher fee than the per acre fee.
B. Pyne: Use the percentage on the sales slips.

D. Turner: Although no one who spoke in the summary of comments supported this it was supported by industry through the development process because this has been going on for 1 ½ years now.
S. Horn Olsen: The industry has a fundamental wish to have more general fund funding and with no other choice told the Legislature they would agree.
B. Sutter: The fear of going back to the Legislature is unfounded. The trend is user pay on everything, not just aquaculture fees. This is a bigger picture problem and this is only part of it and should happen.
C. Pendleton: It is wrong that in the past 3 months this council has been asked twice to vote on things they oppose. Should the question be raised about conflict of interest by members?
Chair D. Rice: The By-Laws contain information we should look at.
Dep. Comm. Etnier read Article II Section 6 Abstentions that contains text pertaining to voting and direct interest. The wording comes from the Legislatures' own rules that they operate under and for this council too; with the exception of Special Licenses our view is that council members as individuals benefit no more or less than others in the same class of persons in that sector and therefore may vote.
B. Sutter: To be unable to vote would disenfranchise persons.
Chair D. Rice: Reread the motion.
L. Churchill: The motion is to reject the rulemaking for Chapter 2 on fees as written. This means that a negative (no) vote brings it back to the floor and an affirmative (yes) vote is to reject it.
Motion continued:
Affirmative votes: Mike Danforth, Bill Sutter, Ralph Smith and Larry Knapp
Negative votes: Blair Pyne, Al West, David Turner, Craig Pendleton, Scott Tilton and Dana Temple
Abstention (non-affirmative): Dana Rice, Sr.
The motion failed to reject the rulemaking by a majority of non-affirmative (no) votes.

Motion: *(S. Tilton, B. Pyne) Motion to approve the rulemaking for Chapter 2 on fees as written.*
Discussion: R. Smith asked to discuss adding an amended to the motion that bottom culture annual rental fee be considered at $50 per acre per year.
Chair D. Rice: The amendment would result in a substantive change to the rulemaking and cannot be done.
R. Smith: Withdraw the suggestion for an amended motion but request that the DMR consider this request. What happens after January 1st to the fees? The Department cannot break the contract in the lease agreement documents.
M. Costigan: There is language in all lease agreements that allows the lease fee to be changed.
S. Horn Olsen: The rental fee bills mailed in September were prorated at the $50/acre rate for the 3 months of October - December. If passed then the balance of 9 months (January – September) rental fees due would be billed at the new rate starting January 1st.
Motion continued:
Affirmative votes: Dana Temple, Scott Tilton, Craig Pendleton, Dana Rice, David Turner and Al West
Negative votes: Larry Knapp, Ralph Smith, Blair Pyne, Mike Danforth and Bill Sutter
The motion passed to approve the rulemaking by a majority of affirmative votes.

Chapter 2.90 Limited-Purpose [Aquaculture] License (LPA)
Samantha Horn Olsen and Mary Costigan gave a brief rundown of the rulemaking. Amy Fitzpatrick was asked to join the meeting by speaker-phone. See handout.
C. Pendleton: Explain why scallops are not included in the LPA approved species list.
A. Fitzpatrick: Public health reasons were described; in particular the high levels of paralytic shellfish poison toxins in the viscera for whole scallops are prohibitive, which is where the discussion in the industry always leads.
S. Tilton: Fee status?
M. Costigan: The fees for the LPA license are unchanged.
Motion: *(S. Tilton, B. Pyne) Motion to approve the rulemaking for Chapter 2 on fees as written.*
Discussion:
L. Knapp asked questions about harbormaster approvals and signatures and described a bad example of signature approvals by Michael Liberty's lawyers in Boothbay Harbor years ago.
M. Costigan: The language is the same as the lease rules and this adds that the harbormaster does not have the final say on approval of an LPA license.

L. Knapp: A Marine Patrol Officer (MPO) would be better than some harbormasters.
M. Costigan: Marine Patrol Officers are already included in the process separate from the Harbormasters.
S. Tilton: Is it possible to use the MPO in lieu of a Harbormaster?
M. Costigan: The point is to get the municipalities involved.
B. Sutter complained about the use of the term "unreasonable" in the decision criteria. In his opinion, leases are automatically approved in prime lobster ground due to the lack of definition of this term.
S. Tilton: An LPA is only 20' x 20' in size.
B. Sutter asked the Chair, D. Rice, as to what he would do as a harbormaster when the DMR approves one of these if he considered it an impediment.
D. Rice asked M. Costigan to address.
M. Costigan: In accordance with the LPA rules if they say no it can't proceed beyond that point, which is that the LPA cannot proceed without their signature. If they say no then the Department can review that decision for fairness.
S. Tilton: That's important to understand and these amendments should be supported.
Motion continued: *Unanimous to approve*

4. Other Business

B. Pyne provided an update on the Vessel Safety Council activity to date, see handout. The handout contains a copy of the Task Force recommendations. Most of the larger vessels do this already. Many laws are just not enforced in part because the Coast Guard has to spend more time now on homeland security instead. This has MPO's doing the inspections. There will be sessions on this at the annual Fishermen's Forum in March. This council has a spot on the DMR web site.
Separately, B. Pyne indicated he received a certified mail item regarding wholesale lobster licenses and suggested that the $2.30 mailing cost was money poorly spent. Dep. Comm. Etnier said he would look into whether this was done by Department staff or not.
The Chair asked if this council supported the Vessel Safety Council and the general response was that they did.

Deputy Commissioner Etnier – Rulemaking Process
Dep. Comm. Etnier reviewed the request for this type of process review went back to the urchin season rulemaking in August when we said we'd walk through the process with members at a future meeting.
L. Churchill provided summary handouts of the general applicable rulemaking procedures outlined in both the Department's statutes and Maine's Administrative Procedures Act (APA). An example copy of the Secretary of State's Notice of Agency Rulemaking column, always in the Wednesday editions of the state's 5 major newspapers, was also handed out. After reviewing the handouts Dep. Comm. Etnier introduced Assistant Attorney General Mark Randlett who assists the DMR on legal matters. Mr. Randlett explained that the AG's role in rulemaking is to approve it as to form and legality, which must also be understandable to the average person in the regulated community. They also confirm the statutory authority; is it legal; is it legally enforceable; proper notice given, etc. The DMR gives the AG's office early review of rulemakings instead of at the end of a process that may result in the rulemaking to be redone.
S. Tilton asked how much tweaking authority the Advisory Council has to change a rulemaking once it reaches them to vote on.
M. Randlett: Any changes must be based on comments received within the comment period and consistent. The standard we go by is whether it is substantially different. Changes will depend on a case by case basis. Will someone in the regulated community who did not choose to comment have commented or participated otherwise with the change you suggest to make. Department fiscal or policy matters need to be considered separately. This council provides advice and consent to the DMR and can make recommendations based on the record.
A discussion proceeded that wove around the fee regulation voted upon earlier in the meeting when Mr. Randlett was not present and what authority council members have to make changes to rulemakings.

Annual Research Plan – brief discussion
Dep. Comm. Etnier provided a handout of the plan and described it briefly.

C. Pendleton described the plan as a report with no goals or vision. This does not go to the next step; where to go for monies; this needs more work.
Chair D. Rice asked for volunteers to serve on a sub-committee to review the research plan with Linda Mercer. Member volunteers are C. Pendleton, B. Sutter and A. West.

A copy of the DMR response to an anonymous letter received at the August meeting, read by B. Pyne, on cash sales of lobster was handed out and discussed briefly. A copy was provided to B. Pyne to give to the anonymous writer.

New law book inserts were handed out to members.

The Chair reminded members to review the handout on Council notes by Dep. Comm. Lew Flagg and noted that the general category was disappearing.
D. Turner noted that 72-hour requirement was omitted (oversight) in #9 on groundfish.
C. Pendleton: This came up under B-day trips and the demarcation line implications were briefly discussed.
L. Knapp: Some of this has to do with insurance reasons/needs.

Motion: *(M. Danforth, D. Turner), the Council voted to adjourn.*
Motion continued: *Unanimous to approve*

The next scheduled meeting is Wednesday, January 19, 2005